(1) Supreme Court, U.S. FILED

03 352 SEP 2 2003

Docket No. _____

In the SUPREME COURT of the UNITED STATES

On Petition for Writ of Certiorari for the:

Michigan Supreme Court,

Yee, Petitioner v Shiawassee County Board of Commissioners et al, Respondents; Yee, Petitioner v George Braidwood, Jr. et al Respondents,; Yee, Petitioner v Donald G. Cummings, Trustee et al, Respondents

&

Michigan Court of Appeals, District I Detroit

Yee, Petitioner v Shiawassee County Board of Commissioners et al, Respondents; Yee, Petitioner v George Braidwood, Jr. et al Respondents,; Yee, Petitioner v Donald G. Cummings, Trustee et al, Respondents

&

Shiawassee County, 35th Circuit Court, Michigan

Yee, Petitioner v Shiawassee County Board of Commissioners et al, Respondents

William R. Yee appearing pro se
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83 pp

## Questions Presented

This case will resolve disputes regarding limits of state powers over riparian property on private lakes in the United States, states formerly part of the Northwest Territories and the state of Michigan.

Does this case address an attempt by a state to extend its powers over private property in violation of United States Supreme Court decisions regarding rights of due process and property protected by the Fifth and Fourteenth Amendments of the United States Constitution?

Petitioner says yes.
Respondents would say "No."

Can a state change a court rule and modify a statute so as to permit condemnation of private riparian property for the private use of other riparian property owners on a private lake with no public access and no public purpose alleged in the complaint or proven at trial without violating the intent of the Fifth and Fourteenth Amendments to the United States Constitution?

Petitioner says No.
Respondents would say "Yes."

Are sanctions against Petitioner an abuse of discretion in furtherance of a state's effort to deprive its citizens of property rights protected by the Fifth and Fourteenth Amendments of the United States Constitution?

Petitioner says yes.
Respondents would say "No."

A list of all parties

Michigan SC 122123; COA 226612 Genesee 00-067136-CZ, Shiawassee 99-3617-CZ

William R. Yee, Petitioner

v

Shiawassee County Board Of Commissioners, Bernard Butcher, and George Braidwood, JR., Respondents,

Michigan SC 122124; COA 226613 Genesee County 00-067157-CZ, Shiawassee County 99-4120-CZ

William R. Yee, Petitioner,

v

George Braidwood, Jr., Cynthia Braidwood, George Braidwood, Sr., Rosemary Braidwood, Kimberly Call, Donald G. Cummings, Eva Cummings, Kevin Dutcher, Matthew Dutcher, Lloyd Fayling, Leslie Fayling, Edward Flynn, Josephine Flynn, Bryan Jackson, Kelly Jackson, Eric King, Melody King, Ozark Land Company, Norma Power, Norma Jean Power Trust, Christine Roche, Jerry Shorna, Letha Shorna, Shorna Family trust, Inez Ross, Louis Whalen, Director Of The Department Of Environmental Quality, Director Of The Department Of Natural Resourdes, Michigan State Police, Shiawassee County Commissioners, Shiawassee County Prosecutor, Shiawassee County Sheriff, and Forrest and Eva Cummings Trust, Respondents;

Michigan SC 122125; COA 226614 Genesee County 95-038534-CH, Shiawassee County 95-004535-CH

William R. Yee, Petitioner/Plaintiff below, and

Michigan Attorney General, for Michigan Department of Environmental Quality, Respondent/Intervening Plaintiff Below

v

Donald G. Cummings, Trustee of the Forrest and Eva Cummings Trust, Forrest and Eva Cummings Trust, Forrest Cummings, Eva Cummings, George Braidwood, Cindy Braidwood, Bryan Jackson, Kelly Jackson, Rosemary Braidwood, Kenneth J. Foote, Jerry Shorna, Letha Shorna, Norma Power, Kim Call, Lloyd Fayling, Leslie Fayling, Edward Flynn, Jacqueline Flynn, Eric King, and Melody King, Respondents/Defendants

Michigan Shiawassee No. 00-005032-CZ, 06-14-1999

*IN THE MATTER OF Determination of a Lake Level for the Waters of Bambi Lake*

William R. Yee, Petitioner/Riparian owner and Respondent Below

v

Bernard A. Butcher, Shiawassee County Drain Commissioner, Respondent/Petitioner below, agent for: Shiawassee County Board of Commissioners, Respondents/Petitioners Below

Eva Cummings,; Bryan Jackson, Kelly Jackson, Edward Flynn , Jacqueline Flynn, Inez Ross, Lois Whalen, George Braidwood , Cindy Braidwood, George Braidwood, Sr., Rosemary Braidwood, Sr., Jerry Shorna, Letha Shorna, Kim Call, Eric King, Melody King, Norma Power, Respondents/ Riparian Owners who petitioned the Board of Commissioners;

James P. Edwards, Joyce A. Edwards, David Gingery, Michelle Gingery, Christopher Pearce Angle. June Merece Angle, Respondents/Appellees, Respondents added by court order;

Westerly Tressler, Respondent/3rd Party in Interest (Down-Stream Riparian.

Petitioner does not know of any corporation that has an interest in this proceeding.

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*Yee v. Shiawassee County Bd. of Comm'Rs*, 468 Mich. 852; 658 N.W.2d 491; 2003 Mich. LEXIS 277, February 28, 2003, Decided

*Yee v. Shiawassee County Bd. of Comm'rs*, 664 N.W.2d 212; 2003 Mich. LEXIS 1194, June 12, 2003, Decided

**Statement basis jurisdiction:**

On May 21st, 2002 the Court of Appeals issued *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich. App. 379, 383-391, 393, 399-400; 651 N.W.2d 756 (2002).

Petitioner filed a timely Motion and Brief for Rehearing in *Yee*, id on June 11, 2002. The Court of Appeals denied the Motion for Rehearing in *Yee*, id on July 18, 2002, Appendix page 55-56.

The Petitioner filed a timely Application for Leave to Appeal. The Michigan Supreme Court declined to consider an application for leave to appeal. *Yee v. Shiawassee County Bd. of Comm'Rs*, 468 Mich. 852; 658 N.W.2d 491; 2003 Mich. LEXIS 277, on February 28, 2003, Appendix pages 56-57.

Petitioner filed a timely motion for reconsideration in *Yee*, id, on March 21, 2003. The Michigan Supreme Court denied reconsideration for *Yee v. Shiawassee County Bd. of Comm'rs*, 664 N.W.2d 212; 2003 Mich. LEXIS 1194, June 12, 2003, Decided, Appendix page 57-59.

The affirmation in *Yee*, id did in fact move private riparian property on private lakes from the domain of deeded property rights into the domain of the The Natural Resources and Environmental Protection Act, Act 451 of 1994 and Act 57, 58, 59, 60 and 71 of 1995, Part 307, Inland Lake Levels, MCLA §§ 324.30701; MSA § 13A.30701 et seq, hereinafter the ILLA.

The affirmation in *Yee*, id did in fact render private riparian property subject to condemnation without compensation for the private use of other riparian owners.

The Michigan Supreme Court has allowed the affirmation in *Yee*, to extend the reach of the ILLA (Inland Lake Level Act) from navigable waters and public lakes to private lakes with no public access. The ILLA and *Yee*, id permit condemnation of private riparian land for the private use of other riparian owners with no public purpose or use in violation of the U.S. Const, Am V and IV and precedent

established by the United States Supreme Court. This is a major intrusion of state power over private property. This intrusion potentially sets precedents in all 50 states. It sets precedent to private lakes in the states that were formerly the Northwest Territories, i.e. Michigan.

The United States Supreme Court has jurisdiction over *Yee*, id pursuant to Supreme Court Rule 10(c) and 13(1) as this petition and proof of service is filed within 90 days of 6-12-2003, the date the motion for reconsideration was denied in the in *Yee*, id.

The Michigan Court of Appeals, hereinafter the COA did reference a "companion case" on May 21st, 2002 in, *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich. App. 379, 387-388; 651 N.W.2d 756 (2002), hereinafter "*in re* Bambi Lake":

> Upon completion of this study in April 2000, the board directed the county {251 Mich. App. 388} attorney to commence an action in the Shiawassee Circuit Court "to set the water surface elevation level at Bambi Lake at 800.67 feet." The county attorney initiated such action on June 13, 2000. According to the parties, that matter is currently pending in the Shiawassee Circuit Court, (IN THE MATTER OF Determination of a Lake Level for the Waters of Bambi Lake, 35th Circuit No. 00-005032-CZ, 06-14-1999, Michigan Court of Appeals No., 244794, hereinafter be referred to as "*in re Bambi Lake*")

The United States Supreme Court has jurisdiction over "*in re* Bambi Lake" as a "companion case" pursuant to Supreme Court Rule 14(1)(h)(ii).

Court Rule 29(4)(b) does not apply.

## The constitutional provisions

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

***First English Evangelical Lutheran Church v County of Los Angeles***, 482 U. S. 304 (1987);

*Cincinnati v Vester*, 281 U. S. 439 (1930);

*Missouri P. R. Co. v Nebraska*, 164 U. S. 403, (1896)

**A concise statement of the case**

Petitioner relies upon the statement of the case rendered by the Michigan Court of Appeals in, *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich. App. 379, 383- 391; 651 .W.2d 756 (2002):

I. Basic Facts and Procedural History

These matters arise from a dispute regarding the water level of Bambi Lake,[1] an impoundment of water created following the construction of a dam along a branch of Spring Hollow Creek in southern Shiawassee County. The dam was constructed in the early 1970s by defendant Forrest Cummings, pursuant to a permit issued by the state department of conservation. [2] After formation of the lake, Cummings sold off parcels fronting the water to several of the named defendants in these actions or their predecessors in interest. Plaintiff purchased one such lot, with an existing residence, in 1986. According to plaintiff, at the time he purchased the home its basement "was in good repair," with "no evidence of dampness, leakage, or other significant damage to the basement floor." Beginning in 1994, however, the floor of plaintiff's basement began to "heave and crack" as a result of {251 Mich. App. 384} increased hydrostatic pressure beneath the home prompted by a rise in the lake's water level, which is controlled by a spillway located at the southwest end of the lake.[3] According to plaintiff, from 1970 to 1993 the lake's water level had been consistently maintained at 799 feet above sea level, the "crest elevation" cited in the dam permit awarded Cummings in 1970. However, beginning in 1994, the lake's water level began to rise, resulting in the encroachment of lake water onto portions of plaintiff's property that were previously dry and in damage to trees and other vegetation on his property. To alleviate these problems, as well as the resulting damage to his home, plaintiff removed the top

spillway stop log in order to lower the lake's level to its previous elevation of 799 feet. Shortly thereafter, however, owners of property surrounding the lake replaced the stop log and placed a pad lock on the spillway, thereby setting the lake's level at a permanent elevation of approximately 800.95 feet above sea level.

In August 1995, plaintiff filed suit (Docket No. 226614) alleging that defendants had conspired to operate the spillway in a manner calculated to maintain Bambi Lake at a level detrimental to his property.[4] Plaintiff sought relief in the form of monetary damages for trespass and additionally requested that the trial court issue an injunction requiring the defendant property owners to reduce the lake's level to a {251 Mich. App. 385} crest elevation of 799 feet above sea level, in accordance with the 1970 dam permit.

In February and June 1998, defendants moved to bifurcate trial of plaintiff's claims in the interest of judicial economy, arguing that the damages issue would not need to be decided unless it was first determined that the lake was being maintained at an inappropriate level. The trial court agreed and, in July 1998, entered an order bifurcating the lake level issue from that of damages. The portion of the case pertaining to monetary damages was nevertheless submitted to mediation in November 1998, pursuant to MCR 2.403, with trial on the lake level issue scheduled to take place before the bench on January 20, 1999. On January 7, 1999, the mediation clerk issued notice advising that all parties had accepted the mediation evaluation in favor of the plaintiff. The following week the trial court was informed that defendant Forrest Cummings had died on January 8, 1999.

On January 18, 1999, issues concerning the trial court's authority to establish a legal lake level were raised in a trial brief submitted by intervening plaintiff

Michigan Department of Environmental Quality (DEQ). [5] In its brief, the DEQ argued that, contrary to plaintiff's position, the dam permit awarded to Forrest Cummings in April 1970 under the former dam construction approval act [6] did not establish an enforceable lake level, because establishment of a {251 Mich. App. 386} legal lake level was outside the scope of the act. Rather, the department argued, the exclusive method for establishing a legal lake level is through the procedures outlined under Part 307 of the Natural Resources and Environmental Protection Act (NREPA). [7] Because those procedures had not been followed, the department argued, the trial court had no authority to act in the manner requested by plaintiff. The department further argued that, even if the 1970 dam permit could be found to have established an enforceable lake level, because Cummings was now deceased, there was no one left against whom the trial court could enforce the permit requirements. Accordingly, the DEQ requested that the matter be dismissed.

Several defendants adopted the arguments of the DEQ in motions for summary disposition filed on January 19, 1999. On January 20, 1999, the parties assembled for trial on the lake level issue. Before trial, however, the court heard argument on the issues raised by the DEQ in its trial brief. After hearing the arguments of all parties, the court determined that summary disposition of plaintiff's claims was appropriate. In doing so, the trial court ruled (1) that the 1970 dam construction permit did not establish a legal lake level, (2) that even if the permit had operated as such, the permittee had passed away and thus there was no one against whom to enforce such a {251 Mich. App. 387} level, (3) that the determination of a lake level for purposes of assessing damages liability was

moot in light of mediation acceptance, and (4) that it had no jurisdiction to determine and impose a legal lake level in the absence of an action filed pursuant to Part 307 of the NREPA. The trial court further suggested that if the parties wished to establish a legal lake level, they should petition the Shiawassee County Board of Commissioners to do so "as soon as possible."

An order granting summary disposition under MCR 2.116(C)(4), lack of subject-matter jurisdiction, and MCR 2.116(C)(8), failure to state a claim on which relief could be granted, was entered in favor of all defendants on February 3, 1999. The order expressly provided that the parties could file judgments pursuant to mediation acceptance following entry of that order. Counsel for the various parties prepared judgments pursuant to MCR 2.403(M), the last of which was entered on February 18, 1999. Plaintiff, however, apparently refused to accept the judgment proceeds or to sign a satisfaction of judgment, and thus each of the defendants was required to pay the judgment proceeds to the county clerk, who issued the necessary satisfactions of judgment.

Several days after dismissal of plaintiff's suit, those defendants who were riparian owners on Bambi Lake petitioned the Shiawassee County Board of Commissioners to establish a normal lake level for Bambi Lake under Part 307 of the NREPA. Acting on this petition, the Shiawassee County Board of Commissioners, on April 15, 1999, directed that an engineering study be conducted in order to determine the historic water surface elevation of the lake. Upon completion of this study in April 2000, the board directed the county {251 Mich. App. 388} attorney to commence an action in the Shiawassee Circuit Court "to set the water surface elevation level at Bambi Lake at 800.67 feet." The county attorney initiated such

action on June 13, 2000. According to the parties, that matter is currently pending in the Shiawassee Circuit Court.

On August 6, 1999, plaintiff filed a second action (Docket No. 226612), naming the Shiawassee County Board of Commissioners, the Shiawassee County Drain Commissioner, and George Braidwood, Jr., as defendants. [8] The first amended complaint, under which this action was litigated, sought to enjoin the county commissioners from setting a legal water level for Bambi Lake. In bringing this action, plaintiff asserted that the issue of the lake level was properly before the trial court in the 1995 action and that the dam permit set the legal lake level at 799 feet above sea level, and demanded that the trial court issue an order declaring that the legal lake level had been set at 799 feet above sea level. Plaintiff further sought damages for the flooding of his property, as well as an injunction "to abate the flooding."

On November 22, 1999, plaintiff filed a third action relating to the water level of Bambi Lake (Docket No. 226613). [9] Although filed as a claim to quiet title and determine interests in land, the relief sought by plaintiff was in essence the same as that sought in the previous two actions, i.e., an order declaring that the "lawful normal" elevation of Bambi Lake, as established by the 1970 dam permit, was 799 feet above {251 Mich. App. 389} sea level, and that no county agency had authority to alter that level.

Each of the defendants in the second case, and a majority of those in the third, moved for summary disposition under various theories, including res judicata stemming from the trial court's previous ruling that the 1970 dam permit did not establish a legal lake level and plaintiff's acceptance of mediation regarding any damages related to the flooding of his property.

The county defendants further argued that summary disposition of plaintiff's request to enjoin the board of commissioners from seeking to establish a legal lake level under Part 307 of the NREPA was appropriate, because the board had not yet filed the requisite petition in the circuit court seeking to do so and, therefore, there was no basis for an injunction at that time. [10] At a hearing on these motions, plaintiff argued that because the issue of the lake level was not decided in the previous action, res judicata did not apply to bar his subsequent suits. Plaintiff further argued that, because Bambi Lake is a private lake rather than a public lake, the Shiawassee County Board of Commissioners did not have authority to seek establishment of a legal lake level for Bambi Lake and that it therefore did not matter that the board had not yet filed a petition in the circuit court seeking to do so. The trial court disagreed, finding that an injunction against the county commissioners was premature and that plaintiff had nonetheless failed to meet the requirements for injunctive relief. Accordingly, the trial court dismissed plaintiff's {251 Mich. App. 390} request for injunctive relief under MCR 2.116(C)(8). The trial court further found that, in light of its previous ruling that the 1970 dam permit did not establish a legal lake level, as well as plaintiff's acceptance of mediation, any subsequent claims for damages or equitable relief based on the elevations cited in that permit were barred by res judicata and thus summary disposition under MCR 2.116(C)(7) was appropriate.

In September 1999, plaintiff attempted to revive the litigation in Docket No. 226614 by filing a motion for postjudgment relief requesting that the trial court reverse its order granting defendants summary disposition and allow plaintiff to substitute a representative for the deceased Forrest Cummings and

> add any other party necessary to allow that action to continue. Plaintiff asserted that he was entitled to such relief under MCR 2.612(C), because the defendants had perpetrated a fraud on the court by representing that the action could not continue upon Cummings' death despite the right to substitute a representative party provided for under MCR 2.202 and MCR 2.207. Plaintiff further argued that he was denied due process because MCR 2.116(B)(2) does not permit a hearing on a motion for summary disposition until twenty-eight days after service of the pleadings on the nonmoving party. After hearing argument from the parties, the trial court denied the motion, finding no fraud to have occurred. Plaintiff subsequently sought reconsideration of the motion, which was ultimately denied.
>
> While reconsideration was pending in the trial court, plaintiff filed a claim of appeal in each of these three cases. This Court consolidated the appeals and {251 Mich. App. 391} ordered that plaintiff's claims be treated as if on leave granted.[11]

The Michigan Court of Appeals made reference to the "*companion case*" in *Yee supra*, pages 387-388:

> Upon completion of this study in April 2000, the board directed the county {251 Mich. App. 388} attorney to commence an action in the Shiawassee Circuit Court "to set the water surface elevation level at Bambi Lake at 800.67 feet." The county attorney initiated such action on June 13, 2000. According to the parties, that matter is currently pending in the Shiawassee Circuit Court.

The "*companion case*" is, IN THE MATTER OF Determination of a Lake Level for the Waters of Bambi Lake, 5th Circuit No. 00-005032-CZ, hereinafter "*in re* Bambi Lake".

On March 19, 2001 the judge in "*in re* Bambi Lake" denied a motion to transfer (Appendix Pages 59-60) the case to Judge Judith Fullerton pursuant to MCR 8.111 Assignment of Cases:

> (D) Actions Arising Out of Same Transaction or Occurrence. Subject to subrule 8.110(C),
>
> (1) if one of two or more actions arising out of the same transaction or occurrence has been assigned to a judge, the other action or actions must be assigned to that judge;
>
> (2) if an action arises out of the same transaction or occurrence as a civil action previously dismissed or transferred, the action must be assigned to the judge to whom the earlier action was assigned;
>
> (3) the attorney for the party bringing the other action under subrule (1) or the new action under subrule (2) shall notify the clerk of the fact in writing in the manner prescribed in MCR 2.113(C)(2). An attorney who knowingly fails to do so is subject to disciplinary action.
>
> (4) The chief judge may reassign cases, other than those encompassed by subrule 8.111(D)(1), in order to correct docket control problems resulting from the requirements of this rule.

The judge in "*in re* Bambi Lake" conducted a trial in June of 2002, hereinafter "the trial".

At "the trial" in June of 2002 in "*in re* Bambi Lake" Mr. Protasiewiecz testified that Bambi Lake would be higher and lower at different times, trial transcript, page 136, (Appendix Page 62).

Mr. Protasiewiecz testified that part of Appellant William R. Yee's property would be flooded at the proposed normal elevation of Bambi Lake at 800.67 feet above sea level, trial transcript pages 164-165, (Appendix Page 62-63).

Mr. Protasiewicz testified in "*in re* Bambi Lake" that flooding Appellant's property would not be a detriment because Appellant would then own the part of the lake that flooded Appellant's property, trial transcript pages 346-349. (Appendix Pages 63-66).

Mark Vanraemdonck was a surveyor and testified for respondents in "*in re* Bambi Lake" that at no time did he know what the proper elevation of Bambi Lake was, trial transcript page 410, (Appendix Pages 66).

At "the trial" Petitioner submitted deeds and surveys filed with the Register of Deeds. In 1974 and 1979 Plaintiff's predecessors in interested purchased 5281 Lake Drive, Owosso, MI 48867 from Forrest and Eva Cummings in two parcels, trial transcript pages 404, (Appendix Page 66-67) and 447-450, (Appendix Pages 67-70). The chain of title shows Petitioner's property to "the water's edge" on a "private lake", trial transcript page 450, (Appendix pages 69-70).

Petitioner's property (known as 5281 Lake Drive) was surveyed on 1974 and 1978 and the surveys filed in the Shiawassee County Register of Deeds office, "*in re* Bambi Lake" trial transcript pages 399-400, (Appendix pages 70-71) and 451, (Appendix page 71-72) and accepted by the court at page 407 (Appendix page 72) as fact. At page 408 (Appendix page 73) of the trial transcript Mr. Davison conceded that nowhere was there a reservation by the seller to raise or lower Bambi Lake.

Appellant testified in "*in re* Bambi Lake" that starting around 1994 Bambi Lake started revolving around 801 feet above sea level. Prior to that Appellant observed that Bambi Lake was unstable around 799.0 feet above sea level, trial transcript, page 510, (Appendix page 73-74).

After the attorneys made closing arguments the trial judge in "*in re* Bambi Lake" determined that the ILLA aka the Inland Lake Level Act, allowed private property to be

flooded without a claim of public purpose, proof of condemnation, trial transcript, page 612:

> Third, any taking in connection with the establishment of a lake level is incidental to a broader public purpose and, I don't think, under current Federal Constitutional takings law would constitute taking for purposes for the Fifth Amendment. But that issue, as I say, has been addressed already by the Court of Appeals.

The trial judge then ordered that Bambi Lake be set at 800.67 feet above mean sea level, Appendix Pages 60-61.

On 09/20/02 Petitioner filed a motion for a new trial and relief from a judgment pursuant to MCR 2.611 & MCR 2.612 and a trial pursuant to MCLA § 324.30710; MSA § 13A.30710; MCL § 213.52; MSA § 8.265(2). The trial judge denied motion on 10/29/2002, Appendix Pages 61-62

**A direct and concise argument**

**Prior Law: Property Rights the Common Law**

This case will resolve a dispute regarding riparian property rights on a private inland lake (Bambi Lake), which has no navigable inlet or outlet and no public access.

Stare decisis controlled law in Michigan prior to 1990, *Bott v. Natural Resources Comm'n*, 415 Mich. 45, 77-78, 327 N.W.2d 838 (1982):

Prior to *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich. pp. 379, 383- 391, 393, 399-400; 651 N.W.2d 756 (2002) riparian rights were circumscribed by common law concepts of the public interests in a navigational servitude and fishery, *Peterman v Dep't of Natural Resources*, 446 Mich 177, 194-195; 521 N.W.2d 499 (1994):

Bambi Lake is a private lake and is not navigable. It is not subject to any public interest pursuant to *Bott v Natural Resources Comm*, 415 Mich 45, 60; 327 NW2d 838 (1982).

**Prior Law: Riparian Property Rights Under Deeds**

Petitioner owns riparian property that may not be flooded

pursuant to the deed of title, Fifth Amendment of the United States Constitution and art 10, § 2 of the Michigan Constitution, *Mumaugh v McCarley*, 219 Mich App 641, 646-647; 558 NW2d 433 (1996).

In Michigan property rights are found in deeds where any ambiguity is construed against the seller in favor of the buyer. In "*in re* Bambi Lake" the deeds in trial exhibit 2-X were clarified by surveys filed in the office of the county register of deeds, trial Exhibits 2-V and 2-W. The buyer has a reasonable expectation that the seller will maintain Bambi Lake at the elevation that occurred at the time of the certified surveys filed with register of deeds office pursuant to *Thomas v Steuernol*, 185 Mich. App. 148, 155; 460 N.W.2d 577 (1990).

The surveys do not control the actual shape of the property along the shoreline, which is described as meandering and may change with erosion and reliction, *Peterman v Dep't of Natural Resources*, 446 Mich 177, 184, 193; 521 N.W.2d 499 (1994), id footnote 21. In fact the 1978 survey shows one foot of increase of the property to the east (reliction) and into Bambi Lake as compared to the 1974 survey, putative reliction assuming the sellor and lake owner maintained Bambi Lake at 799.0 feet above mean sea level.

The deed however controls the elevation of Bambi Lake and Respondents may not claim a natural elevation for Bambi Lake as the lake is controlled by the owner's operation of a dam pursuant to *Gillespie* v *Dunn* 246 Mich 415, 419; 224 NW 374 (1929).

The seller may not raise Bambi Lake pursuant to, *Thomas* supra page 155 and *Stuart* v *Defrost Finnish Co-op. Summer Camp Assn.*, 277 Mich 144, 151; 269 NW 122 (1936).

Petitioner has a right to abate flooding pursuant to *Winchell* v *Clark*, 68 Mich 64, 75; 35 NW 907 (1888).

Petitioner has a right to abate flooding pursuant to *Koopman v Blodgett*, 70 Mich 610, 618-619; 38 NW 649 (1888):

Respondants may not raise Bambi Lake and flood Petitioners property pursuant to *Kraft* v *Miller*, 314 Mich 390, 393, 403; 22 NW2d, 857 (1946):

The county commissioners may not flood petitioner's property pursuant to *Peterman* v *Department of Natural Resources*, 446 Mich 177, 184, 187, 203, 205, 206; 521 NW2d 499 (1994).

Furthermore, such nuisances may be halted by the issuance of an injunction, *Peterman v Dep't of Natural Resources*, 446 Mich 177, 205-206; 521 N.W.2d 499 (1994)

All possible parties must be made a party to the action to quiet title pursuant to *Jeness v Smith*, 58 Mich 280, 285; 25 NW 191 (1885).

Petitioner's failure to bring everyone who may interfere with property rights, including state agencies, into a complaint to quiet title will cause the action to fail pursuant to *Haddon v Hemingway*, 39 Mich 615, 616 and 618-619 (1878).

State agencies and officers are subject to an action to quiet title pursuant to *Monroe v Carter*, 167 Mich 325, 327-328; 132 NW 1023 (1911):

**Prior Law Permitted Suit to Protect Property**

Under prior law Petitioner could in fact obtain jurisdiction to establish a lake level upon the basis of deeded property rights, *Arnold* v *Ellis*, 5 Mich App 101, 109-112; 145 NW2d 822 (1966).

**Prior Law Applied the ILLA to Public Waters**

Prior to the *Yee* case the ILLA did not apply to private inland lakes unless they were navigable and there was a public purpose pled and proven pursuant to *Niles v. Meeker*, 219 Mich. 361, 367-368; 189 N.W. 207 (1922):

{219 Mich. 367}The authority given the board of supervisors by Act No. 202 is limited to determining "the natural height and level of the water" of this lake, and to "acquire, in the name of the county, by gift or purchase, or by condemnation proceedings, any existing dam which may affect the level of the waters in such lake, and all sites for dams or embankments or other lands," etc., needful or convenient to carry out the purposes of the act, which are to aid navigation or {219 Mich. 368} promote public health. A definite determination of need for that purpose and of the normal shore line or "natural height and level" of such lake is made the basis of all which follows. Not only did the board of supervisors fail to find the natural level, but it made no declaration that any action to that end was necessary "in order to improve or maintain navigation thereon, or to promote public health or welfare." When the petition was presented to the board it turned the matter over to a committee and later simply "approved" the report of such committee. The report contained no suggestion of what the "natural height and level" of the lake was, nor its ordinary, normal average or mean level, at any time or for any length of time, and recommended an arbitrary, artificial level higher than that found at a certain date by an engineer whose report shows no attempt on his part to determine the natural level. The only reason given by the committee in its report for recommending such arbitrary

Prior to the *Yee* case the ILLA did apply only to public lakes pursuant statute and *In re Van Ettan Lake*, 149 Mich. App. 517, 522-523; 386 N.W.2d 572 (1986):

The expense of determining the normal height and water level of any public inland lake, the expense of constructing and maintaining any dam, together with the cost and expense of acquiring lands and other

property by condemnation necessary thereto, may be assessed, levied and collected upon the taxable property within the special assessment district." MCL § 281.79; MSA § 11.300(19).

Section 19 in its original form provided that the cost of constructing and maintaining a dam under the 1961 act "may be assessed, levied and collected upon the taxable property of the county, the same as other general taxes are assessed, levied and collected in such county". Financing through special assessment districts was authorized pursuant {Mich. App. 523} to a 1969 amendment. We think that if the Legislature had intended to authorize the creation of special assessment districts only where the county sought to change a previous determination, build a new structure or determine a lake level for the first time, it could easily have said so in the 1969 amendment.

Respondent's jurisdictional argument is frustrated not only by the terms of the statute but by the case law as well. Respondent's reliance on *Niles v Meeker*, 219 Mich 361, 368; 189 NW 207 (1922), is misplaced since, in that case, the Supreme Court held that the county had no authority under the predecessor statute to construct a proposed dam because it had failed to first obtain a determination of the natural height and water level and had failed to substantiate on the record the benefit of the dam to the navigability of the lake or to the public health or welfare of the county. Petitioner met both requirements in the instant case.

**Michigan Now Changes Prior Law**

In November of 1990 Michigan courts altered property rights by a change in court rule, MCR 7.215(I)(1),

(I) Resolution of Conflicts in Court of Appeals Decisions.

> (1) Precedential Effect of Published Decisions. A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

In 2002 Michigan courts further altered property rights pursuant to , *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich. App. 379, 399-400; 651 N.W.2d 756 (2002),

> In reaching this conclusion, we recognize that a panel of this Court previously considered the statutory language now found in MCL 324.30702(1) and concluded that, by providing that the county "may"—as opposed to "shall"—seek to initiate proceedings to determine the normal level of an inland lake, the Legislature did not foreclose a private cause of action for {251 Mich. App. 400} this purpose.[49] The panel in *Arnold*, however, failed to consider the comprehensive nature of the statutory scheme employed by the Legislature or the public purpose in devising that scheme, and we therefore reject its conclusion that suit by an individual is not foreclosed. In any event, because that case was decided before November 1, 1990, we are not bound to follow the decision.[50]

**The public safety is protected by the Dam Safety Act**

Bambi Lake is a private lake, it is not navigable and as no public access. It is not necessary or reasonable to invoke PART 307. INLAND LAKE LEVELS, MCLA § 324.30701; MSA § 13A.30701 et seq. as the public safety is adequately protected by Part 315 of the NREPA, DAM SAFETY.

The public safety is protected by PART 315. DAM SAFETY, of the NREPA, MSA § 324.31501; MSA § 13A.31501 et seq. The public safety is protected

specifically by the Emergency Action Plan, MCLA § 324.31523; MSA § 13A.31523

> (1) An owner shall prepare, and keep current, emergency action plans for all high and significant hazard potential dams owned by that person.
>
> (2) Emergency action plans shall be submitted to the department.
>
> (3) The applicable county or local emergency management coordinators shall review for consistency emergency action plans with the county or local emergency operations plan prior to submission of those plans to the department.
>
> (4) An emergency action plan shall be consistent with the applicable provisions of the affected county or local emergency operations plans and the Michigan emergency preparedness plan as developed pursuant to the emergency preparedness act, Act No. 390 of the Public Acts of 1976, being sections 30.401 to 30.420 of the Michigan Compiled Laws.
>
> (5) Emergency action plans shall include, but not be limited to, the name, address, and telephone number of the person, and of an alternate person, responsible for operation of the dam; the name and telephone number of local emergency management coordinators; and a listing of occupied facilities, buildings, and residences that may be threatened with flooding due to a failure of the dam.

The "owner" would include any of the parties who have acted to regulate the elevation of Bambi Lake, pursuant to MCL § 324.31504; MSA § 13A.31504

> (5) "Owner" means a person who owns, leases, controls, operates, maintains, manages, or proposes to construct a dam.

**Michigan Changes to Petitioner's Property Rights**

The court of appeals referred to the "*in re* Bambi Lake", *Yee* supra, pp 388-399

> Several days after dismissal of plaintiff's suit, those defendants who were riparian owners on Bambi Lake petitioned the Shiawassee County Board of Commissioners to establish a normal lake level for Bambi Lake under Part 307 of the NREPA. Acting on this petition, the Shiawassee County Board of Commissioners, on April 15, 1999, directed that an engineering study be conducted in order to determine the historic water surface elevation of the lake. Upon completion of this study in April 2000, the board directed the county {251 Mich. App. 388} attorney to commence an action in the Shiawassee Circuit Court "to set the water surface elevation level at Bambi Lake at 800.67 feet."

Setting Bambi Lake at 800.67 feet above mean sea level will operate to condemn part of Appellant/Respondent's property at 5281 Lake Drive, Owosso, MI 48867 by flooding, Appendix page 62.

Setting Bambi Lake at 800.67 feet above mean sea level will flood petitioner's property for the private benefit of respondent riparian owners. Bambi Lake is a private lake with no navigable inlet or outlet, no public access and no possible public purpose within the boundaries of the U.S. Const, Am V and XIV. Federal law prohibits condemnation of part of 5281 Lake Drive by flooding for the private use of the other riparian owners pursuant to *City of Lansing v Edward Rose Realty, Inc.*, 192 Mich. App. 554- 555; 481 NW2d 795 (1992):

> Both the Fifth Amendment of the federal constitution and Const 1963, art 10, § 2 prohibit the taking of private property without just compensation. Any condemnation must serve a public purpose or public

necessity, or the condemnation is invalid. *Pere Marquette R Co v United States Gypsum Co*, 154 Mich 290, 297; 117 NW 733 (1908). When the power of eminent domain is exercised in a way benefiting specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. *Pole-town Neighborhood Council v Detroit*, 410 Mich 616, 634-635; 304 NW2d 455 (1981). See also *Center Line v Chmelko*, 164 Mich App 251; 416 NW2d 401 (1987). The public benefit must not only be the primary benefit conferred by the condemnation, but must also be "clear and significant" rather {192 Mich. App. 555} than "speculative or marginal." *Poletown*, supra, pp 634-635.

Michigan courts with *Yee* now violate U.S. Const, Am XIV pursuant to *Kampf v Kampf*, 237 Mich. App. 377, 381-382; 603 N.W.2d 295 (1999):

> The federal and Michigan constitutions guarantee that the state cannot deny people "life, liberty, or property without due process of law." U.S. Const, Am XIV; Const 1963, art 1, § 17. Due process, which is similarly defined under both constitutions, *Palmer v Bloomfield Hills Bd of Ed*, 164 Mich. App. 573, 576; 417 N.W.2d 505 (1987), specifically enforces the rights {Mich. App. 382} enumerated in the Bill of Rights, and it also provides for substantive and procedural due process. *Daniels v Williams*, 474 U.S. 327, 337; 106 S. Ct. 662; 88 L. Ed. 2d 662 (1986). Procedural due process limits actions by the government and requires it to institute safeguards in proceedings that affect those rights protected by due process, such as life, liberty, or property. See *Electro-Tech, Inc v HF Campbell Co*, 433 Mich. 57, 66, n 9; 445 N.W.2d 61 (1989); Dow v Michigan, 396 Mich. 192, 202; 240 N.W.2d 450 (1976).

The state power of eminent domain rests upon the necessity to take property to serve a public purpose. Michigan may not take private property without due process and just compensation, *Standard Industries, Inc. v. Michigan Department of Transportation*, 183 Mich App 53, 54 N.W.2d 417; (1990):

> It is well established that private property may not be taken for public use without due process of law and just compensation. *Thom v State Highway Comm'r*, 376 Mich 608, 613; 138 NW2d 322 (1965). A taking is said to have occurred once a verdict is confirmed, the deed executed, and the award paid. However, in certain situations governmental actions may amount to a de facto taking prior to an actual eminent domain proceeding. *Foster v Detroit*, 254 F Supp 655, 662 (ED Mich, 1966).

**The mediation agreement did not include taking petitioner's property;**

The *Yee* case refers to a mediation agreement. Mediation includes damages to the house and property. However the trial court did in fact determine that it had no jurisdiction to determine the lawful elevation of Bambi Lake, because that could only be done under the NREPA, "(4) that it had no jurisdiction to determine and impose a legal lake level in the absence of an action filed pursuant to Part 307 of the NREPA.", *Yee*, supra p 387.

Damages contemplated by the mediation agreement were damages that accrued at the time of the acceptance of the mediation agreement and with Bambi Lake at the elevation at the time of purchase according to rights encompassed by the deed. The mediation agreement contemplated a separate trial to abate flooding, not an action under the NREPA. The damages were damages measured by Bambi Lake being restored to its legal level under the deeded rights with no

flooding after the mediation agreement pursuant to *Arnold* v *Ellis*, 5 Mich App 101, 109-112; 145 NW2d 822 (1966).

The mediation agreement contemplated a trial to abate flooding and pursuant to *Arnold* v *Ellis*, 5 Mich App 101, 109-112; 145 NW2d 822 (1966) and did not consent to any flooding after the mediation agreement. Since the court had no jurisdiction "pursuant to Part 307 of the NREPA", *Yee*, supra p 387, there was no jurisdiction to condemn, and no damages contemplated in the mediation agreement by flooding or condemnation after the time of the mediation agreement.

Without jurisdiction to restore Bambi Lake to the level at the time of original purchase the mediation agreement is not properly used as res judicata for either damages or condemnation, "a court is continually obliged to question sua sponte its own jurisdiction over a person, the subject matter of an action, or the limits of the relief it may afford", *Yee*, supra p 399.

The mediation agreement does not contemplate flooding and damage after January 20, 1999, *Yee*, supra p 399.

**Michigan Denies Petitioner Due Process**

The ILLA requires that the Shiawassee County Prosecutor and the Shiawassee County Commissioners and the Shiawassee County Drain Commissioner arrange for Petitioner to have a Jury Trial pursuant to:

MCLA § 324.30710; MSA § 13A.30710

> Sec. 30710. If the department or the delegated authority determines that it is necessary to condemn private property for the purpose of this part, the department or county may condemn the property in accordance with the uniform condemnation procedures act, Act No. 87 of the Public Acts of 1980, being sections 213.51 to 213.77 of the Michigan Compiled Laws.

MCL § 213.52; MSA § 8.265(2):

> (2) If property is to be acquired by an agency through the exercise of its power of eminent domain, the agency shall commence a condemnation action for that purpose. An agency shall not intentionally make it necessary for an owner of property to commence an action, including an action for constructive taking or de facto taking, to prove the fact of the taking of the property.

The petition to set Bambi Lake at 800.67 feet was filed on June 13, 2000, *Yee* supra pp 387-388.

The County Commissioners, the County Drain Commissioner and the Shiawassee County Prosecutor knew that Petitioner's property would be flooded on July 8 of 1999 when Mr. Protasiewiecz surveyed Bambi Lake as part of his preparation of an engineering study conducted to determine the historic water surface elevation of the Bambi Lake, Trial Transcript page 117, Appendix page 62.

Mr. Protasiewiecz testified that part of Petitioner's property would in fact be flooded, Trial transcript page 164, appendix page 62.

When the trial court denied Petitioners motion for a jury trial on October 29th, 2002, appendix pages 61-62, the court did in fact deny Petitioner due process rights secured by the U.S. Const, Am XIV and MCLA § 324.30710; MSA § 13A.30710; MCL § 213.52; MSA § 8.265(2). In fact the Shiawassee County Prosecutor and the Shiawassee County Commissioners had a duty pursuant to; MCL § 213.52; MSA § 8.265(2) to arrange for the jury trial.

The trial judge in the "companion case" aka "*in re* Bambi Lake" did in fact deny Petitioner due process rights to a trial by jury on the issue of damages for flooding after January 20, 1999 and condemnation of Petitioners property by flooding when the court set Bambi Lake at 800.67 feet above sea level.

**Supreme Court Decisions Protect the Petitioner**

The Supreme Court has ruled that there are situations where the ultimate determination of a public purpose rests with the court, *Cincinnati v Vester*, 281 US 439 (1930); *Missouri P. R. Co. v Nebraska*, 164 US 403 (1896). Petitioner asserts that this is such a case.

The Supreme Court has ruled that temporary taking entitles petitioner to compensation, ***First English Evangelical Lutheran Church v County of Los Angeles***, 482 U. S. 304 (1987). Petitioner asserts that this is a case of temporary and permanent taking.

Petitioner asserts that this case merits consideration by the United States Supreme Court because this case pushes the boundaries of state authority over private property past a public purpose. The power of the United States Supreme Court is properly asserted in this case to limit State Authority over private property to an actual public purpose.

**Case Summary**

The Michigan Court of Appeals and the Michigan Supreme Court have denied Petitioner the right to abate flooding of his riparian property pursuant to *Arnold* v *Ellis*, 5 Mich App 101, 109-112; 145 NW2d 822 (1966), *Yee*, supra page 400.

The Michigan Court of Appeals and the Michigan Supreme Court have imposed the mediation acceptance upon Petitioner while contending that the trial court did not have jurisdiction to determine the elevation of Bambi Lake, *Yee* supra page 387.

Setting Bambi Lake at 800.67 feet above mean sea level will operate to flood Petitioners property, Appendix page 62 and is a taking pursuant to *Hart v Detroit*, 416 Mich. 488, 501-504; 331 N.W.2d 438 (1982).

The Michigan Court of Appeals and the Michigan Supreme Court and the Shiawassee County Circuit Court,

the Shiawassee County Commissioners, the Shiawassee County Drain Commissioner are

a. denying Petitioner the protection of *Arnold* v *Ellis*, 5 Mich App 101, 109-112; 145 NW2d 822 (1966); Appendix page 43, in violation of the U.S. Const, Am V and XIV

b. flooding Petitioner's property, (Bambi Lake at 800.67 feet above mean sea level), Appendix 62;

c. condemning petitioner's property (Appendix page 62) without the jury trial required by MCLA § 324.30710; MSA § 13A.30710; MCL § 213.52; MSA § 8.265(2), violating ***First English***; and *Cincinnati v Veste;* and *Missouri P. R. Co.*, supra.

d. condemning petitioner's property by flooding (Appendix page 62) for private riparian owners on Bambi Lake with no stated or proven public purpose and violating the U.S. Const, Am V and XIV;

e. denying Petitioner the due process right of having 35th Circuit No. 00-005032-CZ assigned to Judge Judith Fullerton pursuant to MCR 8.111(D) in violation of the U.S. Const, Am V and XIV.

**Relief Sought:**

Petitioner respectfully requests the United States Supreme Court

a. to grant protections afforded by U.S. Const, Am V and XIV; MCLA § 324.30710; MSA § 13A.30710; MCL § 213.52; MSA § 8.265(2); and *Arnold* v *Ellis*, 5 Mich App 101, 109-112; 145 NW2d 822 (1966); and MCR 8.111(D) and issue a Judgment Pursuant to Supreme Court Rule 41 that *Yee v Shiawassee Co Bd of Comm'rs*, ch. App. 379, 383- 391, 393, 399-400; 651 N.W.2d 756 (2002) violates U.S. Const, Am V and XIV and prior decisions of the United States Supreme Court; *Cincinnati v Veste;* and *Missouri P. R. Co.*, supra.

b. to issue a mandate in the name of the President of the United States pursuant to Supreme Court Rule 45 that the Michigan Court of Appeals and the Michigan Supreme Court and the trial judges in *Yee v Shiawassee Co Bd of Comm'rs*, ch. App. 379, 383-391, 393, 399-400; 651 N.W.2d 756 (2002) and the Shiawassee County Circuit Court IN THE MATTER OF Determination of a Lake Level for the waters of Bambi Lake, 5th Circuit No. 00-005032-CZ shall vacate the ruling in *Yee v Shiawassee Co Bd of Comm'rs*, ch. App. 379, 383- 391, 393, 399-400; 651 N.W.2d 756 (2002).

c. to issue a mandate in the name of the President of the United States pursuant to Supreme Court Rule 45 that the Michigan Court of Appeals and the Michigan Supreme Court and the trial judges in *Yee v Shiawassee Co Bd of Comm'rs*, ch. App. 379, 383-391, 393, 399-400; 651 N.W.2d 756 (2002) and the Shiawassee County Circuit Court IN THE MATTER OF Determination of a Lake Level for the waters of Bambi Lake, 5th Circuit No. 00-005032-CZ shall allow petitioner to proceed to trial under *Arnold* v *Ellis*, 5 Mich App 101, 109-112; 145 NW2d 822 (1966).

d. to issue a mandate in the name of the President of the United States pursuant to Supreme Court Rule 45 that the Michigan Court of Appeals and the Michigan Supreme Court and the trial judges in *Yee v Shiawassee Co Bd of Comm'rs*, ch. App. 379, 383-391, 393, 399-400; 651 N.W.2d 756 (2002) and the Shiawassee County Circuit Court IN THE MATTER OF Determination of a Lake Level for the waters of Bambi Lake, 5th Circuit No. 00-005032-CZ and shall issue opinions that all of Petitioner's actions were reasonable, not frivolous, not intended for any unacceptable purpose including but not limited to

harassment or annoyance and shall issue orders to rescind all costs and all sanctions payable by petitioner to respondents.

e. to issue a mandate in the name of the President of the United States pursuant to Supreme Court Rule 45 that the Michigan Court of Appeals and the Michigan Supreme Court and the trial judge in *Yee v Shiawassee Co Bd of Comm'rs*, ch. App. 379, 383-391, 393, 399-400; 651 N.W.2d 756 (2002) and the Shiawassee County Circuit Court IN THE MATTER OF Determination of a Lake Level for the waters of Bambi Lake, 35th Circuit No. 00-005032-CZ that further proceedings shall be assigned to Judge Judith Fullerton pursuant to MCR 8.111(D) and the U.S. Const, Am V and XIV.

f. to issue a mandate in the name of the President of the United States pursuant to Supreme Court Rule 45 that the Michigan Court of Appeals and the Michigan Supreme Court and the trial judge in *Yee v Shiawassee Co Bd of Comm'rs*, ch. App. 379, 383-391, 393, 399-400; 651 N.W.2d 756 (2002) and the Shiawassee County Circuit Court IN THE MATTER OF Determination of a Lake Level for the waters of Bambi Lake, 35th Circuit No. 00-005032-CZ shall conduct a jury trial in accordance with petitioner's constitutional rights under U.S. Const, Am V and XIV; MCLA § 324.30710; MSA § 13A.30710; MCL § 213.52; MSA § 8.265(2); and *Arnold* v *Ellis*, 5 Mich App 101, 109-112; 145 NW2d 822 (1966); and MCR 8.111(D)

I, William R. Yee, assert that all of the above are true to the best of my knowledge, information and belief

_____

William R. Yee, Wednesday, August 13, 2003

P. O. Box 310, Owosso, MI 48867-0310, 517 214-6196

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**Appendix:**

State of Michigan Court of Appeals

| | |
|---|---|
| William R. Yee, | For Publication |
| Plaintiff-Appellant, | May 21st, 2002 |
| v | 9:05 a.m. |
| Shiawassee County Board | No: 226612. |
| Of Commissioners, | Genesee Circuit Court |
| Bernard Butcher, and | LC No. 00-067136-CZ |
| George Braidwood, Jr., | |
| Defendants-Appellees. : | |

_____/

| | |
|---|---|
| William R. Yee, | COA: 226613 |
| Plaintiff-Appellant, | Genesee Circuit Court |
| v | LC No.: 00-67157-CZ |

George Braidwood, Jr., Cynthia Braidwood, George Braidwood, Sr., Rosemary Braidwood, Kimberly Call, Donald G. Cummings, Eva Cummings, Kevin Dutcher, Matthew Dutcher, Lloyd Fayling, Leslie Fayling, Edward Flynn, Josephine Flynn, Bryan Jackson, Kelly Jackson, Eric King, Melody King, Ozark Land Company, Norma Power, Norma Jean Power Trust, Christine Roche, Jerry Shorna, Letha Shorna, Shorna Family Trust, Inez Ross, Louis Whalen, Director of the Department of Environmental Quality, Director of the Department of Natural Resources, Michigan State Police, Shieawssee County Commissioners, Shiawassee County Prosecutor, Shiawassee County Sheriff and Forrest and Eva Cummings Trust, Defendants-Appellees.

_____/

| | |
|---|---|
| William R. Yee, Plaintiff-Appellant, | COA: 226614 |
| and | Genesee CC: 95-038534-CZ |
| Attorney General, Intervening Plaintiff-Appellee, | |
| v | |

Donald G. Cummings, Trustee Forrest and Eva Cummings Trust, Forrest and Eva Cummings Trust, Forrest Cummings, Eva Cummings, George Braidwood, Cindy Braidwood, Bryan Jackson, Kelly Jackson, Rosemary Braidwood, Kenneth J. Foote, Jerry Shorna, Letha Shorna, Norma Power, George Braidwood, Sr., Kimberly Call, Floyd Fayling, Leslie Fayling, Edward Flynn, Jacqueline Flynn, Eric King, and Melody King, Defendants-Appellees.

BANDSTRA, J.

In these consolidated cases, plaintiff appeals the trial court's orders granting summary disposition in favor of defendants. We affirm.

I. Basic Facts and Procedural History

These matters arise from a dispute regarding the water level of Bambi Lake,[1] an impoundment of water created following the construction of a dam along a branch of Spring Hollow Creek in southern Shiawassee County. The dam was constructed in the early 1970s by defendant Forrest Cummings, pursuant to a permit issued by the state department of conservation.[2] After formation of the lake, Cummings sold off parcels fronting the water to several of the named defendants in these actions or their predecessors in interest. Plaintiff purchased one such lot, with an existing residence, in 1986. According to plaintiff, at the time he purchased the home its basement "was in good repair," with "no evidence of dampness, leakage, or other significant damage to the basement floor." Beginning in 1994, however, the floor of plaintiff's basement began to "heave and crack" as a result of {251 Mich. App. 384} increased hydrostatic pressure beneath the home prompted by a rise in the lake's water level, which is controlled by a spillway located at the southwest end of the lake.[3] According to plaintiff, from 1970 to 1993 the lake's water level had been consistently maintained at 799 feet above sea level, the "crest elevation" cited in the dam permit

awarded Cummings in 1970. However, beginning in 1994, the lake's water level began to rise, resulting in the encroachment of lake water onto portions of plaintiff's property that were previously dry and in damage to trees and other vegetation on his property. To alleviate these problems, as well as the resulting damage to his home, plaintiff removed the top spillway stop log in order to lower the lake's level to its previous elevation of 799 feet. Shortly thereafter, however, owners of property surrounding the {651 N.W.2d 761} lake replaced the stop log and placed a pad lock on the spillway, thereby setting the lake's level at a permanent elevation of approximately 800.95 feet above sea level.

In August 1995, plaintiff filed suit (Docket No. 226614) alleging that defendants had conspired to operate the spillway in a manner calculated to maintain Bambi Lake at a level detrimental to his property.[4] Plaintiff sought relief in the form of monetary damages for trespass and additionally requested that the trial court issue an injunction requiring the defendant property owners to reduce the lake's level to a {251 Mich. App. 385} crest elevation of 799 feet above sea level, in accordance with the 1970 dam permit.

In February and June 1998, defendants moved to bifurcate trial of plaintiff's claims in the interest of judicial economy, arguing that the damages issue would not need to be decided unless it was first determined that the lake was being maintained at an inappropriate level. The trial court agreed and, in July 1998, entered an order bifurcating the lake level issue from that of damages. The portion of the case pertaining to monetary damages was nevertheless submitted to mediation in November 1998, pursuant to MCR 2.403, with trial on the lake level issue scheduled to take place before the bench on January 20, 1999. On January 7, 1999, the mediation clerk issued notice advising that all parties had accepted the mediation evaluation in favor of the plaintiff. The following week the trial court

was informed that defendant Forrest Cummings had died on January 8, 1999.

On January 18, 1999, issues concerning the trial court's authority to establish a legal lake level were raised in a trial brief submitted by intervening plaintiff Michigan Department of Environmental Quality (DEQ).[5] In its brief, the DEQ argued that, contrary to plaintiff's position, the dam permit awarded to Forrest Cummings in April 1970 under the former dam construction approval act[6] did not establish an enforceable lake level, because establishment of a {251 Mich. App. 386} legal lake level was outside the scope of the act. Rather, the department argued, the exclusive method for establishing a legal lake level is through the procedures outlined under Part 307 of the Natural Resources and Environmental Protection Act (NREPA).[7] Because those procedures had not been followed, the department argued, the trial court had no authority to act in the manner requested by plaintiff. The department further argued that, even if the 1970 dam permit could be found to have established an enforceable lake level, because Cummings was now deceased, there was no one left against whom the trial court could enforce {651 N.W.2d 762} the permit requirements. Accordingly, the DEQ requested that the matter be dismissed.

Several defendants adopted the arguments of the DEQ in motions for summary disposition filed on January 19, 1999. On January 20, 1999, the parties assembled for trial on the lake level issue. Before trial, however, the court heard argument on the issues raised by the DEQ in its trial brief. After hearing the arguments of all parties, the court determined that summary disposition of plaintiff's claims was appropriate. In doing so, the trial court ruled (1) that the 1970 dam construction permit did not establish a legal lake level, (2) that even if the permit had operated as such, the permittee had passed away and thus there was no one against whom to enforce such a {251 Mich. App. 387}

level, (3) that the determination of a lake level for purposes of assessing damages liability was moot in light of mediation acceptance, and (4) that it had no jurisdiction to determine and impose a legal lake level in the absence of an action filed pursuant to Part 307 of the NREPA. The trial court further suggested that if the parties wished to establish a legal lake level, they should petition the Shiawassee County Board of Commissioners to do so "as soon as possible."

An order granting summary disposition under MCR 2.116(C)(4), lack of subject-matter jurisdiction, and MCR 2.116(C)(8), failure to state a claim on which relief could be granted, was entered in favor of all defendants on February 3, 1999. The order expressly provided that the parties could file judgments pursuant to mediation acceptance following entry of that order. Counsel for the various parties prepared judgments pursuant to MCR 2.403(M), the last of which was entered on February 18, 1999. Plaintiff, however, apparently refused to accept the judgment proceeds or to sign a satisfaction of judgment, and thus each of the defendants was required to pay the judgment proceeds to the county clerk, who issued the necessary satisfactions of judgment.

Several days after dismissal of plaintiff's suit, those defendants who were riparian owners on Bambi Lake petitioned the Shiawassee County Board of Commissioners to establish a normal lake level for Bambi Lake under Part 307 of the NREPA. Acting on this petition, the Shiawassee County Board of Commissioners, on April 15, 1999, directed that an engineering study be conducted in order to determine the historic water surface elevation of the lake. Upon completion of this study in April 2000, the board directed the county {251 Mich. App. 388} attorney to commence an action in the Shiawassee Circuit Court "to set the water surface elevation level at Bambi Lake at 800.67 feet." The county attorney initiated such action on June 13,

2000. According to the parties, that matter is currently pending in the Shiawassee Circuit Court.

On August 6, 1999, plaintiff filed a second action (Docket No. 226612), naming the Shiawassee County Board of Commissioners, the Shiawassee County Drain Commissioner, and George Braidwood, Jr., as defendants.[8] The first amended complaint, under which this action was litigated, sought to enjoin the county commissioners from setting a legal water level for Bambi Lake. In bringing this action, plaintiff asserted that the issue of the lake level was properly before the trial court in the 1995 action and that the dam permit set the legal lake level at 799 feet above sea {651 N.W.2d 763} level, and demanded that the trial court issue an order declaring that the legal lake level had been set at 799 feet above sea level. Plaintiff further sought damages for the flooding of his property, as well as an injunction "to abate the flooding."

On November 22, 1999, plaintiff filed a third action relating to the water level of Bambi Lake (Docket No. 226613).[9] Although filed as a claim to quiet title and determine interests in land, the relief sought by plaintiff was in essence the same as that sought in the previous two actions, i.e., an order declaring that the "lawful normal" elevation of Bambi Lake, as established by the 1970 dam permit, was 799 feet above {251 Mich. App. 389} sea level, and that no county agency had authority to alter that level.

Each of the defendants in the second case, and a majority of those in the third, moved for summary disposition under various theories, including res judicata stemming from the trial court's previous ruling that the 1970 dam permit did not establish a legal lake level and plaintiff's acceptance of mediation regarding any damages related to the flooding of his property. The county defendants further argued that summary disposition of plaintiff's request to enjoin the board of commissioners from seeking to establish a legal

lake level under Part 307 of the NREPA was appropriate, because the board had not yet filed the requisite petition in the circuit court seeking to do so and, therefore, there was no basis for an injunction at that time.[10] At a hearing on these motions, plaintiff argued that because the issue of the lake level was not decided in the previous action, res judicata did not apply to bar his subsequent suits. Plaintiff further argued that, because Bambi Lake is a private lake rather than a public lake, the Shiawassee County Board of Commissioners did not have authority to seek establishment of a legal lake level for Bambi Lake and that it therefore did not matter that the board had not yet filed a petition in the circuit court seeking to do so. The trial court disagreed, finding that an injunction against the county commissioners was premature and that plaintiff had nonetheless failed to meet the requirements for injunctive relief. Accordingly, the trial court dismissed plaintiff's {251 Mich. App. 390} request for injunctive relief under MCR 2.116(C)(8). The trial court further found that, in light of its previous ruling that the 1970 dam permit did not establish a legal lake level, as well as plaintiff's acceptance of mediation, any subsequent claims for damages or equitable relief based on the elevations cited in that permit were barred by res judicata and thus summary disposition under MCR 2.116(C)(7) was appropriate.

In September 1999, plaintiff attempted to revive the litigation in Docket No. 226614 by filing a motion for postjudgment relief requesting that the trial court reverse its order granting defendants summary disposition and allow plaintiff to substitute a representative for the deceased Forrest Cummings and add any other party necessary to allow that action to continue. Plaintiff asserted that he was entitled to such relief under MCR 2.612(C), because the defendants had perpetrated a fraud on the court by representing that the action could not continue upon Cummings' death despite the right to substitute a

representative party provided for under MCR 2.202 and MCR 2.207. Plaintiff further argued that he was denied due process because MCR 2.116(B)(2) does not permit a hearing on a motion for summary disposition until twenty-eight days after {651 N.W.2d 764} service of the pleadings on the nonmoving party. After hearing argument from the parties, the trial court denied the motion, finding no fraud to have occurred. Plaintiff subsequently sought reconsideration of the motion, which was ultimately denied.

While reconsideration was pending in the trial court, plaintiff filed a claim of appeal in each of these three cases. This Court consolidated the appeals and {251 Mich. App. 391} ordered that plaintiff's claims be treated as if on leave granted.[11]

II. Docket No. 226614

A. Summary Disposition

In Docket No. 226614, plaintiff first argues that the trial court's granting of summary disposition to defendants was error because defendants did not comply with the notice requirements of MCR 2.116(B)(2), thereby denying him due process. Although we agree that defendants violated the notice requirements provided under the court rules, we find that summary disposition of plaintiff's suit was nonetheless proper.

Initially, we note that the court rule relied on by plaintiff in asserting a lack of sufficient notice does not apply to the facts of this case. MCR 2.116(B)(2) provides:

A motion under this rule may be filed at any time consistent with subrule (D) and subrule (G)(1), but the hearing on the motion brought by a party asserting a claim shall not take place until at least 28 days after the opposing party was served with the pleading stating the claim.[12]

As noted by this Court in Smith v Sinai Hosp of Detroit,[13] "MCR 2.116(B)(2) does not apply to defendants

who wish to move for summary disposition," but rather "governs plaintiffs who wish to move for immediate summary disposition upon the filing of a {251 Mich. App. 392} complaint, hence the words 'a party asserting a claim' in MCR 2.116(B)(2)." Nevertheless, plaintiff is correct that defendants' motions for summary disposition were not timely filed. Under MCR 2.116(G), a written motion for summary disposition, along with a supporting brief and any affidavits or other documentary evidence, must be filed and served at least twenty-one days before the date set for hearing on the motion.[14] Although the trial court may set a different time for filing and service of such a motion, any such authorization must be either endorsed in writing on the face of the notice of hearing or made by separate order.[15] Here, it is not disputed that the motions on which the trial court granted summary disposition were heard on the day of trial, after being filed and served the previous day without the written imprimatur of the trial court. However, as explained below, summary disposition was proper despite this procedural deficiency.[16]

As previously noted, before dismissal of plaintiff's suit all parties accepted mediation {651 N.W.2d 765} with respect to the damages claimed by plaintiff to have resulted from the flooding of his property. Thus, the only issue left to be resolved at trial was that concerning the appropriate {251 Mich. App. 393} level of the waters of Bambi Lake.[17] The trial court, however, concluded that it was without jurisdiction to reach a determination on that issue and granted summary disposition under, among other subsections, MCR 2.116(C)(4). In reaching this conclusion the trial court found that, contrary to plaintiff's assertion, the water levels and impoundment surface areas cited in the 1970 dam construction permit did not establish an enforceable legal lake level and that any proceeding to set such a level must be initiated under Part 307 of the NREPA. After review of the relevant statutes, we agree that

the trial court lacked jurisdiction to render the requested relief.

"Jurisdictional questions under MCR 2.116(C)(4) are questions of law that are . . . reviewed de novo."[18] Statutory interpretation is similarly a question of law that is reviewed de novo on appeal.[19] The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature, and the first criterion in determining such intent is the specific language of the statute.[20]

{251 Mich. App. 394} The 1970 dam construction permit at issue here was issued under the provisions of the now repealed dam construction approval act (DCAA).[21] The preamble to 1963 PA 184, which established the DCAA, states, in relevant part, that the purpose of the act was "to require the obtaining of approval by the department of conservation before erection of dams in streams or rivers . . . ." To effectuate this purpose, the act permitted the department to require permit applicants to submit "detailed plans" of the proposed construction and provide those funds estimated to be necessary "to cover the actual cost of making an engineering study of the plans submitted and of making inspection [of the dam] during and after construction."[22] The act further authorized the department to promulgate rules "governing [the] standards and methods of construction and materials used so as to insure the structural soundness of any dam," and to "cancel any permit issued by it upon failure to comply" with those standards.[23] Given this language, it is clear that the provisions of the act were intended simply to provide for a method of regulating the construction of dams in this state in order to ensure their {651 N.W.2d 766} structural integrity. Although this goal would necessarily require consideration and approval of proposed impoundment surface areas and levels, nothing in the act indicates that these were intended to establish an enforceable lake level.

To the contrary, that a construction permit issued under the DCAA was not intended to establish {251 Mich. App. 395} an enforceable lake level is clearly indicated by the Legislature's amendment of the DCAA in July 1970 (just three months after issuance of the Cummings permit) to require successful permit applicants to petition for the establishment of a legal lake level under the Inland Lake Level Act of 1961 (ILLA):[24]

> Prior to 60 days following construction of any impoundment created by a dam authorized by this act with a head of 5 feet or over, or impounding 5 or more acres,[25] the permittee, subject to the provisions of [the ILLA], shall petition the county board of supervisors for a court-established lake level and establishment of a special assessment district for future maintenance of the lake level. The permittee shall record the court order establishing the lake level with the register of deeds, and advise the department of natural resources in writing of such compliance.[26]

Although this section was repealed by 1989 PA 300, and not replaced when the remainder of the DCAA was recodified as the Dam Safety Act,[27] if, as plaintiff asserts, permits issued under the DCAA were intended by the Legislature to establish an enforceable lake level, this amendatory provision would have been wholly unnecessary. Such an interpretation is contrary to the rules of statutory construction.[28] Moreover, even excepting this amendment of the DCAA, the fact that the Legislature has, since 1911, provided a {251 Mich. App. 396} separate comprehensive statutory scheme for the establishment of inland lake levels strongly militates against any claim that issuance of a construction permit under the DCAA was intended to establish a legally enforceable lake level.[29]

Statutes that relate to the same subject matter or share a common purpose are in pari materia and must be read together as one law.[30] In Michigan, there has been a

statutory vehicle for the establishment of a legal lake level, in a form substantially unchanged through today, since the enactment of 1911 PA 202. The modern version of this statutory scheme, the ILLA, was enacted in 1961 "to provide for the determination and maintenance of the normal height and level of the waters in inland lakes of this state, for the protection of the public health, safety and welfare and the conservation of the natural resources of this state."[31]

After its enactment, the ILLA underwent only minor revisions until 1995, when it was substantially reorganized and recodified {651 N.W.2d 767} as Part 307 of the NREPA.[32] However, despite this extensive reorganization, the substance of the act remains as it was under the ILLA. The procedures for initiating an action to establish the "normal level" of an inland lake are currently outlined in §§ 30702-30704 of the NREPA.[33] Subsection 30702(1),[34] provides:

The county board of a county in which an inland lake is located may upon the board's own motion, or shall within {251 Mich. App. 397} 45 days following receipt of a petition to the board of 2/3 of the owners of lands abutting the inland lake, initiate action to take the necessary steps to cause to be determined the normal level of the inland lake.[35]

Subsection 30703(1),[36] authorizes the county board to commission a preliminary engineering study to determine the necessity and feasibility of establishing such normal level. As did its predecessor, Part 307 further provides that

if the county board, based on the preliminary study, finds it expedient to have and resolves to have determined and established the normal level of an inland lake, the county board shall direct the prosecuting attorney or other legal counsel of the county to initiate a proceeding by proper petition in the court of that county for determination of the

normal level for that inland lake and for establishing a special assessment district if the county board determines that one is necessary . . . .[37]

Section 30707 requires extended publication of notice before any hearing on the matter[38] and sets forth a number of factors that the court must consider when determining the normal height and level of the waters in inland lakes, including the historical lake level and any testimony or evidence offered by "interested persons."[39]

Although nothing in Part 307 specifically excludes initiation of such proceedings by an individual so {251 Mich. App. 398} interested, we conclude that, by enacting such a comprehensive scheme for the establishment and maintenance of legal lake levels, the Legislature has signified its intent to vest authority to initiate such a proceeding solely within the county board of commissioners or its delegated authority. Accordingly, without such action by these public authorities, a circuit court is powerless to act.

It is fundamental that the classes of cases over which the circuit courts have subject-matter jurisdiction are defined by this state's constitution and Legislature.[40] By enacting the procedures outlined in Part 307 of the NREPA and its predecessor, the ILLA, the Legislature clearly limited the court's power to determine legal lake levels to those actions initiated by the county commissioners in accordance with the act.[41]

{651 N.W.2d 768} That the Legislature intended these proceedings to be initiated as a matter of public rather than private action is further supported by the public purpose of the statute.[42] As recognized by this Court in *In re Van Ettan Lake*:[43]

The purpose of the [ILLA] is to provide for the control and maintenance of inland lake levels for the benefit and welfare of the public. Read as a whole, the act essentially

authorizes counties to make policy decisions as to the levels of their inland lakes, and build and finance dams as necessary to maintain the desired levels. It cannot be reasonably {251 Mich. App. 399} argued that the purpose of the act is to also create or protect individual rights as to inland lake levels. The focus of the act is clearly on the public welfare and not on individual riparian rights.[44]

Because a court is continually obliged to question sua sponte its own jurisdiction over a person, the subject matter of an action, or the limits of the relief it may afford,[45] it was the trial court's duty to take notice of its lack of subject-matter jurisdiction and dismiss plaintiff's claim for injunctive relief pursuant to MCR 2.116(C)(4).[46] Indeed, want of subject-matter jurisdiction is so serious a defect in the proceedings that the trial court was duty-bound to dismiss plaintiff's suit even had defendants not so requested.[47] Accordingly, no prejudice to plaintiff resulted from defendants' untimely filing of their motions for summary disposition and any error was harmless.[48]

In reaching this conclusion, we recognize that a panel of this Court previously considered the statutory language now found in MCL 324.30702(1) and concluded that, by providing that the county "may"--as opposed to "shall"--seek to initiate proceedings to determine the normal level of an inland lake, the Legislature did not foreclose a private cause of action for {251 Mich. App. 400} this purpose.[49] The panel in *Arnold*, however, failed to consider the comprehensive nature of the statutory scheme employed by the Legislature or the public purpose in devising that scheme, and we therefore reject its conclusion that suit by an individual is not foreclosed. In any event, because that case was decided before November 1, 1990, we are not bound to follow the decision.[50]

Moreover, contrary to plaintiff's assertion, Bambi Lake is not outside the scope of Part 307 of the NREPA because it is a private, as opposed to public, lake. {651 N.W.2d 769}

Part 307 defines an "inland lake" over which the county commissioners have authority as simply "a natural or artificial lake, pond, [or] impoundment," without reference to the public or private nature of that body. MCL 324.30701(f) [51]. The statutory definition does not require that the lake be public in order to be subject to the provisions of Part 307.[52]

Plaintiff's reliance on *Bott v Natural Resources Comm*[53] in arguing that no governmental agency has authority to set the level of a private lake is similarly misplaced. *Bott* did not involve an action to determine the normal level of a lake, but rather the test to be applied to determine the navigability of smaller streams and private lakes for purposes of the public {251 Mich. App. 401} trust doctrine. Nothing in the Court's discussion of that matter is applicable to the question of circuit court jurisdiction at issue here.

That Bambi Lake is a private lake similarly does not support plaintiff's claim that initiation of proceedings by a government agency under Part 307 would amount to an unconstitutional taking of private property for a nonpublic purpose.[54] As noted above, the statutory procedures for establishment of a normal lake level were devised "for the protection of the public health, safety and welfare," as well as "the conservation of the natural resources of this state."[55] Even assuming that a governmentally initiated proceeding to determine the normal level of Bambi Lake could constitute a taking of private property, regulation of the lake level directly protects not only those private lands fronting the lake, but also those public resources and property interests located downstream from the spillway.[56] Accordingly, we are not persuaded that governmentally initiated proceedings to determine the normal level of a private lake are constitutionally infirm.

B. Defendant Forrest Cummings' Death

Plaintiff next argues that, upon the death of defendant Forrest Cummings on January 8, 1999, the trial court's jurisdiction over the matter being litigated in Docket No. 226614 abated, rendering void all judgments {251 Mich. App. 402} thereafter entered by the court. This argument is wholly without merit.

The death of a party during the pendency of an action neither abates the suit nor deprives a court of jurisdiction over the matter. The survival statute specifically declares that "all actions and claims survive death."[57] Consistent with this declaration, MCR 2.202(A)(1) permits a court to allow substitution of parties if a party dies and the claim at issue is not {651 N.W.2d 770} thereby extinguished.[58] Here, plaintiff offers no viable support for his assertion that his claim for damages and injunctive relief against the various defendants, including the decedent,[59] was extinguished upon Cummings' death. The authority cited by plaintiff for this proposition, Hoffman v St Clair Circuit Judge,[60] is inapposite, because that case involved the death of one of several defendants in an action for ejectment. Although the Court in Hoffman found that, because the decedent's rights in the real property passed to his heirs immediately upon his death, the action against the decedent abated, the Court nonetheless recognized that the suit against the surviving defendants properly continued. Accordingly, even assuming that the action abated with respect to defendant Forrest Cummings, Cummings' death had no effect on the court's ability to act with respect to the remaining defendants.

{251 Mich. App. 403}

C. Mediation Awards

Plaintiff next asserts that he is entitled to have the judgments entered on the mediation awards set aside on the ground of fraud.[61] Again, we disagree.

Initially, it should be noted that although counsel for plaintiff informally moved to have these awards set aside during argument at the January 20, 1999, hearing on defendants' motion for summary disposition, the matter was not pursued to a decision. Accordingly, this issue has not been preserved for appellate review.[62] Nonetheless, we conclude that plaintiff is not entitled to the requested relief.

Generally, a court should set aside a judgment on the acceptance of mediation only where a failure to do so would result in substantial injustice.[63] Here, despite plaintiff's claim that his acceptance of mediated damages was premised on a belief that a determination of the normal level of Bambi Lake would follow, there is nothing in the record to suggest that his acceptance was contingent on some future event or decision in the case. Moreover, regardless of the basis for plaintiff's acceptance of mediation, nothing guaranteed him a favorable decision in this regard. In any event, because the Shiawassee County Board of {251 Mich. App. 404} Commissioners has since initiated an action to determine the normal level of Bambi Lake pursuant to Part 307 of the NREPA, plaintiff will ultimately receive the judicial determination he claims to have contemplated at the time he accepted the mediation awards. Accordingly, no injustice will result from {651 N.W.2d 771} permitting the challenged judgments to stand.

D. Motion for Relief From Judgment

Plaintiff next argues that the trial court erred in denying his motion for relief from judgment in Docket No. 226614 without first conducting an evidentiary hearing on his claim that the court had been deceived into believing that, with the death of defendant Forrest Cummings, no one against whom to enforce an order to maintain Bambi Lake at the levels cited in the 1970 permit remained. We disagree.

A trial court's decision on a motion for relief from judgment is reviewed for an abuse of discretion.[64] In

seeking relief from the February 3, 1999, order granting defendants summary disposition, plaintiff asserted below that despite defendants' claims at the January 20, 1999, hearing that the death of Cummings, the dam permit holder, precluded the trial court from entering any enforceable order pertaining to maintenance of the Bambi Lake spillway, the property rights to the spillway, and thus the obligations pertaining to its operation, passed to other individuals against whom such an order could be entered and enforced. The trial court, without conducting an evidentiary hearing on this matter as requested by plaintiff, found {251 Mich. App. 405} no fraud to have occurred and denied the motion. On appeal, plaintiff asserts that denial of his motion without the requested hearing was error.

Generally, where a party alleges that a fraud has been committed on the court, it is "an abuse of discretion for the court to decide the motion without first conducting an evidentiary hearing into the allegations."[65] However, courts understandably look with skepticism upon a dissatisfied party's claim of fraud and insist on strict factual proof.[66] Thus, where the party requesting relief fails to provide specific allegations of fraud relating to a material fact, the trial court need not proceed to an evidentiary hearing.[67] Here, although plaintiff raised valid concerns with respect to the trial court's finding that Cummings' death prevented it from entering an enforceable order regarding maintenance of the spillway, plaintiff failed to offer significant, specific allegations of fraud or misrepresentation on the part of defendants. Under these circumstances, we do not conclude that the trial court abused its discretion by denying plaintiff's motion without conducting an evidentiary hearing.[68]

In any event, even assuming that the trial court erred in failing to conduct the requested hearing, the error was harmless because, regardless of the existence of other individuals against whom the subject order could be

enforced, dismissal of plaintiff's suit was required under MCR 2.116(C)(4) for lack of subject-matter jurisdiction.[69]

{251 Mich. App. 406}

III. Docket Nos. 226612 and 226613

A. Summary Disposition

Plaintiff argues that the trial court erred in dismissing his claims in {651 N.W.2d 772} Docket Nos. 226612 and 226613 under MCR 2.116(C)(7), on the basis of res judicata. Plaintiff, however, makes no attempt to specifically address the propriety of summary disposition on these grounds with respect to any of the thirty-four defendants in these combined cases. Generally, "where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court."[70] Indeed, as our Supreme Court stated in Mitcham v Detroit:[71]

It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.

In light of this failure, we find this issue to have been abandoned on appeal and, therefore, decline to address it. Nonetheless, as discussed in part IIA of this opinion, the trial court was without jurisdiction to render the requested relief in these actions, i.e., an order setting the "lawful normal" elevation of Bambi Lake, and was therefore obligated to dismiss the suit under MCR 2.116(C)(4) sua sponte. Consequently, any error in the trial court's application of res judicata to dismiss plaintiff's claims was harmless. Accordingly, {251 Mich. App. 407} we affirm the trial court's dismissal of plaintiff's claims in Docket Nos. 226612 and 226613.[72]

B. Attorney Fees, Costs, and Sanctions

Finally, plaintiff argues that the trial court erred in granting defendants attorney fees, costs, and sanctions. Again, we do not agree.

MCR 2.625(A)(2) provides that if the court finds that an action or defense is frivolous, it must award costs as provided by MCL 600.2591 . Under this statute, "costs" includes "all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees."[73] An action is frivolous if, among other things, the losing "party's legal position was devoid of arguable legal merit" or it was initiated for the "primary purpose of harassing . . . the prevailing party."[74] The filing of a signed pleading that is not well-grounded in fact and law subjects the filer to similar sanctions, pursuant to MCR 2.114(E).

Following the grant of summary disposition in Docket No. 226613, several defendants moved for attorney fees, costs, and sanctions pursuant to MCR 2.625 and MCR 2.114(E), arguing that plaintiff's claims in that action were frivolous. After a hearing on these motions, the trial court found that plaintiff's claims were not "well grounded in fact or law," and were filed "for the purpose of harassment or embarrassment {251 Mich. App. 408} . . . but not for the purpose really of litigating genuine issues of material fact." The trial court accordingly concluded that the action was "absolutely frivolous" and awarded sanctions, costs, and attorney fees to a number of defendants. {651 N.W.2d 773}

On appeal, plaintiff argues that the trial court erred in awarding these fees and costs because his suit held arguable legal merit, and because defendants' conduct below makes any such award unconscionable. This Court will not disturb a trial court's finding that an action was frivolous unless that finding was clearly erroneous.[75] A finding is clearly erroneous when, "although there is

evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made."[76]

Plaintiff has failed to cite any specific conduct by defendants to support his claim that the trial court's award is unconscionable and, accordingly, has waived any appellate review on these grounds.[77] Further, with respect to the legal merit of the suit filed by plaintiff in Docket No. 226613, although filed as a claim to quiet title and determine interests in land, the relief sought by plaintiff in this subsequent action was in essence the same as that sought in the previous action filed against these defendants (Docket No. 226614), i.e., an order declaring that the "lawful normal" elevation of Bambi Lake, as established by the 1970 dam permit, was 799 feet above sea level, and that no county agency had authority to alter that {251 Mich. App. 409} level. Inasmuch as the trial court had previously ruled in that suit that the 1970 dam permit did not establish a legal lake level, and had dismissed the action for want of jurisdiction, we do not conclude that the trial court clearly erred in finding that a subsequent suit seeking to relitigate these same issues was frivolous.[78] Notwithstanding any arguable legal merit to plaintiff's claims in the prior suit, defendants were forced to twice incur the costs of answering and defending against those claims.

We affirm.

/s/ Richard A. Bandstra

/s/ Henry William Saad

/s/ Michael R. Smolenski

Footnotes

1 Bambi Lake is also known as Cummings Lake.

2 The Michigan Department of Conservation and its successor, the Department of Natural Resources (DNR), were responsible for issuing such permits until October 1995, when the powers of the Land and Water Management Division of the DNR, including those respecting the construction and maintenance of dams, were transferred to the

newly created Department of Environmental Quality. See MCL 324.99903 .

3 Stop logs installed at the mouth of the spillway can be added or removed to raise or lower the lake's water level.

4 Shiawassee Circuit Judge Gerald Lostracco recused himself in that matter, and supervision of the case was assigned by the State Court Administrative Office to Judge Judith A. Fullerton in the Genesee Circuit Court.

5 The DEQ was permitted to intervene in the lawsuit on the basis that establishment of an "appropriate" water level for Bambi Lake could potentially require modifications to Cummings Dam, which, as the relevant permitting authority, required DEQ involvement. See MCL 324.31509 ; see also n 2, supra.

6 MCL 281.131 et seq., repealed by 1989 PA 300, § 65. See also n 21, infra.

7 MCL 324.30701 et seq. The statutes governing establishment of "normal," or legal, lake levels were included in the Inland Lake Level Act, MCL 281.61 to 281.86 , until they were repealed by 1994 PA 451, § 90103, and reenacted as Part 307 of the NREPA by 1995 PA 59, § 1, without substantive change. As will be explained, Part 307 requires that any action to establish a legal level for an inland lake be initiated by the county board of commissioners. See MCL 324.30702 .

8 Judge Lostracco again recused himself and the matter was transferred to the Genesee Circuit Court. See n 4, supra.

9 See n 8, supra.

10 The board's petition seeking to set a legal lake level for Bambi Lake was not filed until June 13, 2000.

11 See MCR 7.203(B). Given the interrelation of his arguments, we have also consolidated several of plaintiff's issues on appeal.

12 Emphasis added.

13 *Smith v Sinai Hospital of Detroit*, 152 Mich. App. 716, 723; 394 N.W.2d 82 (1986).

14 MCR 2.116(G)(1)(a)(i).

15 MCR 2.116(G)(1)(b).

16 Contrary to defendants' assertions, MCR 2.116(D)(3) does not relieve them of the obligation to file and serve a motion for summary disposition premised on a lack of subject-matter jurisdiction within the period prescribed by MCR 2.116(G)(1)(a)(i). Although MCR 2.116(D)(3) provides that such grounds for summary disposition may be "raised at any time," the rule merely serves to remove any time limit for asserting those grounds as a basis for summary disposition. See

Michigan Court Rules Practice, Rule 2116.5, p 366.

17 We note that in *Cam Constr v Lake Edgewood Condominium Ass'n*, 465 Mich. 549, 557; 640 N.W.2d 256 (2002), our Supreme Court recently held that parties may no longer "except claims from case evaluation under [MCR 2.403]." "If all parties accept the panel's evaluation, the case is over," and a party may not, therefore, appeal from an adverse summary disposition on any one count in the action. *Cam Constr*, supra at 550; see also MCR 2.403(M)(1). However, because the question is not directly before us, we express no opinion on the applicability of Cam Constr to this matter.

18 *Travelers Ins Co v Detroit Edison Co*, 465 Mich. 185, 205; 631 N.W.2d 733 (2001).

19 *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich. 590, 610; 575 N.W.2d 751 (1998); Ypsilanti Housing Comm v O'Day, 240 Mich. App. 621, 624; 618 N.W.2d 18 (2000).

20 Housing Comm, supra at 624.

21 MCL 281.131 et seq. The DCAA was repealed by 1989 PA 300, § 65 and recodified as the Dam Safety Act, MCL 281.1301 et seq., which was itself repealed by 1994 PA 451, § 90103 and reenacted by 1995 PA 59, § 1 as Part 315 of the NREPA.

22 1963 PA 184, § 2.

23 Id. at § 3.

24 MCL 281.61 et seq., repealed by 1994 PA 451, § 90103. See n 7, supra.

25 The waters of Bambi Lake cover approximately twenty-seven acres.

26 See 1970 PA 68, § 2a.

27 MCL 281.1319 et seq., repealed by 1994 PA 451, § 90103. See n 21, supra.

28 See *Hoste v Shanty Creek Management, Inc*, 459 Mich. 561, 574; 592 N.W.2d 360 (1999) (when interpreting a statute, courts should avoid any construction that would render any part of a statute surplusage or nugatory).

29 See 1911 PA 202.

30 *State Treasurer v Schuster*, 456 Mich. 408, 417; 572 N.W.2d 628 (1998).

31 1961 PA 146, preamble.

32 See n 7, supra.

33 MCL 324.30702 - 324.30704.

34 MCL 324.30702(1).

35 Under MCL 324.30706, the DEQ is similarly vested with authority to initiate "proceedings for determination of the normal level." See ns 2 and 5, supra.

36 MCL 324.30703(1).

37 MCL 324.30704(1).

38 MCL 324.30707(1).

39 See MCL 324.30707(4).

40 MCL 600.605 .

41 Once such a determination has been made, however, circuit court jurisdiction over a lake's level continues. MCL 324.30707(5) ; see also *Anson v Barry County Drain Comm'r*, 210 Mich. App. 322, 325-326; 533 N.W.2d 19 (1995).

42 That Part 307 similarly permits the DEQ to initiate such proceedings is consistent with the public purpose of the act. See n 35, supra.

43 *In re Van Ettan Lake*, 149 Mich. App. 517; 386 N.W.2d 572 (1986).

44 Id. at 525-526 (citations omitted, emphasis added). See also *Wortelboer v Benzie County*, 212 Mich. App. 208, 214; 537 N.W.2d 603 (1995) (although plaintiff riparian owners were "interested persons" within the meaning of the ILLA, the act did not provide them with a private right to bring suit under that act).

45 Straus v Governor, 459 Mich. 526, 532; 592 N.W.2d 53 (1999).

46 See *Fox v Bd of Regents of the University of Michigan*, 375 Mich. 238, 243; 134 N.W.2d 146 (1965) ("A court which has determined that it has no jurisdiction should not proceed further except to dismiss the action."), citing Lehman v Lehman, 312 Mich. 102; 19 N.W.2d 502 (1945).

47 *In re Estate of Fraser*, 288 Mich. 392, 394; 285 NW 1 (1939).

48 MCR 2.613(A).

49 *Arnold v Ellis*, 5 Mich. App. 101, 109-111; 145 N.W.2d 822 (1966).

50 MCR 7.215(I)(1).

51 MCL 324.30701(f) .

52 That the public or private nature of the lake is irrelevant is further supported by the fact that the purpose of the statute, as originally enacted, was to "protect the public health, safety and welfare . . . ." 1961 PA 146, preamble. Regulation of the lake level protects not only the riparian owners on Bambi Lake, but also those who reside

downstream from the spillway.

53 *Bott v Natural Resources Comm*, 415 Mich. 45; 327 N.W.2d 838 (1982).

54 See US Const, Am V; 1963 Const, art 10, § 2.

55 1961 PA 146, preamble.

56 Cf. *Tolksdorf v Griffith*, 464 Mich. 1, 8-9; 626 N.W.2d 163 (2001) (benefit to public at large under private roads and temporary highways act is purely incidental and far too attenuated to support constitutional taking of private property).

57 MCL 600.2921 .

58 See, e.g., *Ponke v Ponke*, 222 Mich. App. 276, 279-280; 564 N.W.2d 101 (1997) (where party to a divorce action dies before entry of judgment, action abates because there is no longer any marriage to dissolve).

59 See, e.g., *Thomas v Steuernol*, 185 Mich. App. 148, 156; 460 N.W.2d 577 (1990) (the defendant's personal representative properly substituted for the defendant on his death).

60 *Hoffman v St Clair Circuit Judge*, 40 Mich. 351 (1879).

61 Although, in his statement of questions presented, plaintiff also asserts that he is entitled to file an amended complaint and add any party necessary to determine damages and the lawful level of Bambi Lake, he offers no argument or authority to support these claims. Accordingly, plaintiff has waived these issues on appeal. *In re Coe Trusts*, 233 Mich. App. 525, 537; 593 N.W.2d 190 (1999) ("A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim.").

62 *Fast Air, Inc v Knight*, 235 Mich. App. 541, 549; 599 N.W.2d 489 (1999) (issues not decided by the trial court are not preserved for appeal).

63 *Hauser v Roma's of Michigan, Inc*, 156 Mich. App. 102, 104; 401 N.W.2d 630 (1986).

64 *Blue Water Fabricators, Inc v New Apex Co, Inc*, 205 Mich. App. 295, 300; 517 N.W.2d 319 (1994).

65 *Rapaport v Rapaport*, 185 Mich. App. 12, 16; 460 N.W.2d 588 (1990).

66 *Kiefer v Kiefer*, 212 Mich. App. 176, 179; 536 N.W.2d 873 (1995).

67 *Young v David Young*, 342 Mich. 505, 507-509; 70 N.W.2d 730 (1955).

68 Id.; see also Kiefer, supra.

69 MCR 2.613(A).

70 *Prince v MacDonald*, 237 Mich. App. 186, 197; 602 N.W.2d 834 (1999).

71 *Mitcham v Detroit*, 355 Mich. 182, 203; 94 N.W.2d 388 (1959).

72 See *Detroit v Presti*, 240 Mich. App. 208, 214; 610 N.W.2d 261 (2000) ("This Court will not reverse a trial court's order if it reached the right result for the wrong reason.").

73 MCL 600.2591(2) .

74 MCL 600.2591(3)(a) .

75 *Szymanski v Brown*, 221 Mich. App. 423, 436; 562 N.W.2d 212 (1997).

76 In re Attorney Fees & Costs, 233 Mich. App. 694, 701; 593 N.W.2d 589 (1999).

77 See *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich. App. 140, 152; 577 N.W.2d 200 (1998).

78 In reaching this conclusion we note that, although not a practitioner, plaintiff is a licensed attorney in the state of Michigan.

251 Mich. App. 417::*People v. City of Ann Arbor*::May 21, 2002, Decided

*****

Court of Appeals, State of Michigan

ORDER — Henry William Saad Presiding Judge

William R Yee — Richard A. Bandstra

v — Michael R. Smolenski Judges

Shiawassee Co Bd of Comm

Docket No.226612; 226613; 226614

LC No.00-067136-CZ; 99-00361 7-CZ

The Court orders that the motion for rehearing is DENIED.

s/ Henry Saad

Presiding Judge

State of Michigan (seal)

Court of Appeals (seal)

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

July 18, 2002. s/Sandra Shultz Mengel.
Date Chief Clerk

****

Michigan Supreme Court Lansing, Michigan

Order
Entered: February 28, 2003
122123-5 & (90)
William R. Yee,
Plaintiff-Appellant,
v
Shiawassee County Board
Of Commissioners,
Bernard Butcher, and
George Braidwood, Jr.,
Defendants-Appellees.

Maura D. Corrigan
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markham
Judges
SC: 122123 COA: 226612
Genesee CC: OO-067136-CZ

/

William R. Yee,
Plaintiff-Appellant,
v
George Braidwood, Jr., Cynthia Braidwood, George Braidwood, Sr., Rosemary Braidwood, Kimberly Call, Donald G. Cummings, Eva Cummings, Kevin Dutcher, Matthew Dutcher, Lloyd Fayling, Leslie Fayling, Edward Flynn, Josephine Flynn, Bryan Jackson, Kelly Jackson, Eric King, Melody King, Ozark Land Company, Norma Power, Norma Jean Power Trust, Christine Roche, Jerry Shorna, Letha Shorna, Shorna Family Trust, Inez Ross, Louis Whalen, Director of the Department of Environmental Quality, Director of the Department of Natural Resources, Michigan State Police, Shieawssee County Commissioners, Shiawassee County Prosecutor, Shiawassee County Sheriff and Forrest and Eva Cummings Trust, Defendants-Appellees.

SC: 122124
COA: 226613
Genesee CC: 00-67157-CZ

_____/

William R. Yee, SC: 122125
Plaintiff-Appellant, COA: 226614
and Genesee CC: 95-038534-CZ
Attorney General,
Intervening Plaintiff-Appellee,
Donald G. Cummings, Trustee Forrest and Eva Cummings Trust, Forrest and Eva Cummings Trust, Forrest Cummings, Eva Cummings, George Braidwood, Cindy Braidwood, Bryan Jackson, Kelly Jackson, Rosemary Braidwood, Kenneth J. Foote, Jerry Shorna, Letha Shorna, Norma Power, George Braidwood, Sr., Kimberly Call, Floyd Fayling, Leslie Fayling, Edward Flynn, Jacqueline Flynn, Eric King, and Melody King, Defendants-Appellees.

_____/

On order of the Court, the application for leave to appeal from the May 21, 2002 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion for superintending control is also considered, and it is DENIED.

Weaver, J., not participating.

I, CORBIN R. DAVIS; Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

B0225

Seal of the Michigan Supreme Court-Lansing

February 28, 2003 s/Inger E Myer,
Deputy Clerk

****

Michigan Supreme Court Lansing, Michigan

Order Maura D. Corrigan
Entered: June 12, 2003 Chief Justice

122123-25(100)(101)
William R. Yee,
Plaintiff-Appellant,
v
Shiawassee County Board
Of Commissioners,
Bernard Butcher, and
George Braidwood, Jr.,
Defendants-Appellees.

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markham
Judges
SC: 122123 COA: 226612
Genesee CC: OO-067136-CZ

/

William R. Yee,
Plaintiff-Appellant,
v
George Braidwood, Jr., Cynthia Braidwood, George Braidwood, Sr., Rosemary Braidwood, Kimberly Call, Donald G. Cummings, Eva Cummings, Kevin Dutcher, Matthew Dutcher, Lloyd Fayling, Leslie Fayling, Edward Flynn, Josephine Flynn, Bryan Jackson, Kelly Jackson, Eric King, Melody King, Ozark Land Company, Norma Power, Norma Jean Power Trust, Christine Roche, Jerry Shorna, Letha Shorna, Shorna Family Trust, Inez Ross, Louis Whalen, Director of the Department of Environmental Quality, Director of the Department of Natural Resources, Michigan State Police, Shieawssee County Commissioners, Shiawassee County Prosecutor, Shiawassee County Sheriff and Forrest and Eva Cummings Trust, Defendants-Appellees.

SC: 122124
COA: 226613
Genesee CC: 00-67157-CZ

/

William R. Yee,
Plaintiff-Appellant,
And
Attorney General,
Intervening Plaintiff-Appellee,

SC: 122125
COA: 226614
Genesee CC: 95-038534-CZ

v

Donald G. Cummings, Trustee Forrest and Eva Cummings Trust, Forrest and Eva Cummings Trust, Forrest Cummings, Eva Cummings, George Braidwood, Cindy Braidwood, Bryan Jackson, Kelly Jackson, Rosemary Braidwood, Kenneth J. Foote, Jerry Shorna, Letha Shorna, Norma Power, George Braidwood, Sr., Kimberly Call, Floyd Fayling, Leslie Fayling, Edward Flynn, Jacqueline Flynn, Eric King, and Melody King, Defendants-Appellees.

_____/

On order of the Court, the motion for reconsideration of this Court's order of February 28, 2003 is considered, and it is DENIED because it does not appear that the order was entered erroneously. The motion for stay is also DENIED.

t0610 Seal of the Michigan Supreme Court-Lansing

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

s/June 12, 2003 s/Inger E Myer,
Deputy Clerk

****

State of Michigan

In the Circuit Court for the County of Shiawassee

In the Matter of: File No. 00-005032-CZ

Determination of a Lake Level for the Waters of Bambi Lake, Bennington Township, SHIAWASSEE County, Michigan, JUDGE: Gerald D. Lostracco

ORDER DENYING MOTION TO TRANSFER

At a session of said court held in the 19th day of March, 2001,

PRESENT: HONORABLE, Randy L. Tahvonen,
Visiting Circuit Court Judge

THIS MATTER having come on to be heard upon the motion of William R. Yee seeking to have this matter transferred to Judge Fullerton, and the Court having considered the pleadings and oral arguments presented in support of the respective positions of the parties, and being fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED that said Motion be and is hereby DENIED.

s/Randy L. Tahvonen

RANDY L. TAHVONEN

Circuit Court Judge Dated: March 19, 2001

F:/15000/15148/Order Denying Transfer

****

State of Michigan

In the Circuit Court for the County of Shiawassee

In the Matter of: File No. 00-005032-CZ

Determination of a Honorable Randy L. Tahvonen

Lake Level for the Waters of Bambi Lake, Bennington Township, SHIAWASSEE County, Michigan,

Order Determining Normal Lake

Level for Bambi (A/K/A Cummings) Lake

At a session of said Court, held in the City of Ithaca, County of Gratiot, State of Michigan on the 36th day of August, 2002. PRESENT: HON. RANDY L. TAHVONEN

This matter having come before the Court on the Petition by the Shiawassee County Board of Commissioners, requesting that the Court determine the normal lake level for Bambi (a/k/a Cummings) Lake in Shiawassee County, pursuant to the authority found in the Inland Lake Level Act, MCL 324.30701 et seq. the Court having conducted a hearing in open court following the notice required by said Act and the Court having listened to the presentations of all interested parties, reviewed the exhibits and pleadings and set forth its findings and conclusions on the record on June

12, 2002;

IT IS HEREBY ORDERED THAT, for the reasons set forth on the record on June 12, 2002, the normal lake level of Bambi (a/k/a Cummings) Lake is set at 800.67 feet above mean sea level and that this elevation is determined to be the top of the weir structure, located in the southwest quadrant of the Lake, with all stop logs in place;

IT IS FURTHER ORDERED THAT the Shiawassee County Drain Commissioner shall prepare a plan to maintain the lake level and shall also prepare and submit to this Court within 60 days hereof a document showing the proposed boundaries for a special assessment district, as provided by MCL 324.30707(5).

IT IS FINALLY ORDERED THAT no sanctions shall be assessed against William Yee, but the normal costs may be taxed by the prevailing parties.

S/RANDY L. TAHVONEN s/SA _____.

Honorable Randy L. Tahvonen Visiting Circuit Court Judge

Countersigned: Deputy clerk

s/ Patrick A. Aseltyne

Drafted by: Patrick A. Aseltyne (P23293)

****

State of Michigan

In the Circuit Court for the County of Shiawassee

In the Matter of: Determination of a Lostracco

File No. 00-005032-CZ

JUDGE: Gerald D.

Lake Level for the Waters of Bambi Lake, Bennington Township, SHIAWASSEE County, Michigan,

Order Denying Motion for New Trial At a session of said Court, held on the 29th day of October, 2002. Present: Honorable Randy L. Tahvonen, Circuit Court Judge

This matter having come on regularly to be heard upon William R. Yea's motion for new trial, the parties having

presented oral argument and the Court being fully advised in the premises;

Now Therefore, It Is Hereby Ordered that the motion for new trial and other relief be and is hereby DENIED.

This Order disposes of all claims and closes the case.

Dated: October 29th, 2002, /Randy L. Tahvonen

Randy L. Tahvonen, Circuit Court Judge

15000/151 48/order denying new trial/na

**Trial transcript page 117 Mr. Protasiewiecz**

A That would be fine, they're over here. The--July 8 of 1999 is when we turned in a benchmark and shot those elevations.

Q So the elevations that you're going to testify here to today would have been the elevations effective as of July 8, '99?

A Yes.

**Trial Transcript page 136 Mr. Protasiewiecz**

so I don't know when the USGS elevations were taken, but when we surveyed it, it was 799.99, it wasn't at 800.67 where the top of the stop logs were, it was down below. So, you know, the lake fluctuates, so my explanation of, you know, the 799 versus our recommended 801.67 or where it was tried to be maintained before, is that whatever time you go out there and check the elevation could be what you put on the map, so those fluctuate.

**Trial transcript page 164 Mr. Protasiewiecz**

Q Okay. So your statement--it's your statement that this portion of my property would be flooded?

A It's an estimation, um hum.

**Transcript Page 165, Mr. Protasiewiecz**

THE COURT: Go ahead with the examination of the witness. Now let me see, this exhibit has been marked to

reflect the area that would be flooded if the lake is fixed at 800.67.

THE WITNESS: It's an estimation.

MR. YEE: That's the part he proposes to flood of my property.

THE COURT: Okay. So I have the portion of the property that would be flooded at 800.67?

**Transcript Pages 346-349 Mr. Protasiewiecz**

BY MR. YEE:

Q So--

ASo when I drew the line the other day and said this area up in here at the proposed elevation would be, if you want to call it flooded, then that's--that's what I was describing.

Q--okay. Is it--is it your belief that if it's set so it falls inside of the box there, that none of the property outside of the box will be flooded to my--and that property would, therefore, be taken away from me and made part of the lake?

A You would still own the property, there are--and, again, I'm not a surveyor so I don't know if I'm the right one to direct these questions to, but my understanding is this is what you own, so you still own that property and we--I personally own property on a lake and we own thirty acres of the lake. It's we own out to a certain line and it's flooded, if you want to say it flooded, or we own part of the lake, it's however you want to look at it. We own part of the lake, we own thirty acres of the lake, so.

Q Do you own riparian property on your lake?

A Yes.

Q Do you know what riparian property rights are?

A I'm not an--no, I'm not an expert at it.

Q You own riparian property but you don't understand

your riparian rights on your own lake?-

A No, if I need to, then I ask somebody that would know.

Q So if by raising the lake according to your recommendation, the flood--the northeast corner--this is the northeast corner on this map, is that correct?

A That's correct.

Q To flood the northeast corner in that box, none of my property outside of that box would be flooded and to my detriment, according to your understanding of that property?

A Again, my opinion is if it were my property then I would own more of the lake. It's not that I would have a detriment to my property.

Q Oh, so I wouldn't be losing anything, I would-

A You would still--you would own more--you'd have a bigger portion of the lake.

Q--I would own more lake and less land, according to where you plan to put the lake?

AYup, by a very small corner in the corner of your property, the lake, it's however you want to look at it. We own part of the lake, we own thirty acres of the lake, so.

Q Do you own riparian property on your lake?

A Yes.

Q Do you know what riparian property rights are?

A I'm not and--no, I'm not an expert at it.

Q You own riparian property but you don't understand your riparian rights on your own lake?

A No, if I need to, then I ask somebody that would know. Q So if by raising the lake according to your recommendation, the flood--the northeast corner--this is the northeast corner on this map, is that correct?

A That's correct.

Q To flood the northeast corner in that box, none of my property outside of that box would be flooded and to my detriment, according to your understanding of that property?

A Again, my opinion is if it were my property then I would own more of the lake. It's not that I would have a detriment to my property.

Q Oh, so I wouldn't be losing anything, I would-A You would still--you would own more--you'd have a bigger portion of the lake.

Q--I would own more lake and less land, according to where you plan to put the lake?

AYup, by a very small corner in the corner of your property, yes.

Q And—

AThat's been my opinion.

Q--and that's one of my benefits of owning this property, is owning more of the lake?

AYou have access to the lake, correct.

QWell, there's a difference between owning the lake and having access, I believe.

THE COURT: Question, doctor? See, that's why you spend time you don't need to waste. Next question, sir.

MR. YEE: I apologize.

THE COURT: You were complaining you didn't have enough time, ask questions, you will.

BY MR. YEE:

Q So it's your understanding that one of the property rights a riparian owner has is that if the lake rises, he gets to own more lake in exchange for his property of dry land?

AYeah, that's one way to look at it.

QThat's your testimony?

A Correct.

Q And so based on that belief, you think that myself and everybody else on the lake benefits by raising the lake to your level?

A From my belief is that there is no detriment to that piece--to your piece of property for having the lake at this proposed elevation that I've set, that I've recommended.

**Transcript Page 410 Mr. Vanraemdonck answering**:

Q So you don't know the elevation of the lake on the date you did the survey?

A I do not.

Q So there's a boundary survey without an elevation?

A That's correct

Q And when you did the survey, did you have any idea as to what the proper elevation of the lake was?

A I did not.

Q Do you have any idea at any time if there was proper elevation for this particular lake?

A I do not.

Q So you can make no--no expert testimony as to the proper elevation of this particular lake at any given date?

A No, I cannot.

**Transcript Page 404: Mr. Vanraemdonck answering**:

And the first two lines of 440--Liber 443, page 222, it *says* to an iron stake, said meander line being for descriptive purposes only and the easterly edge of the parcel being the westerly edge of water of a private lake as intercepted between, and then it goes on. But, basically, what it *says* is I own the property to the water edge--water's edge, and that gives me riparian rights to the lake. And all of these deeds pretty much say the same thing, to the water's edge. And, so--and there's no reservation in any of these deeds that gives Forrest or Eva Cummings the

right to raise the lake or in any way flood any part of the property that was purchased through this chain of title.

Now, I also obtained certified copies of surveys of these two parcels that compose 5281 Lake Drive. The first one has previously been marked as 2-V. The second one is 2-W, and they are Liber 2 of surveys, page 104, and label 3--Liber 3 of surveys, page 106, and these were from the Register of Deeds office in Shiawassee found in Corunna, Michigan.

These are both certified copies, and I would like them to be admitted into evidence at this time.

**Transcript Page 447-450: William Yee testifying:**

**Trial Transcript page 447**

THE COURT It's admitted, doctor

(At 9:26 a.m., exhibit 2-X received into evidence)

THE COURT: So one parcel was purchased by these folks named Raleys, was it?

THE WITNESS: Do you have the marked one in front of you

THE COURT No, but I have my copy and I'd be happy to mark it so we'd all have the same one Do you have a copy to look at

THE WITNESS: I'm looking for it.

THE COURT: Okay.

MR. DAVISON: Dr Yee.

THE WITNESS Oh, it was up on the desk. Thank you. Now that this is marked, who do I--do I give it to the court recorder

THE COURT If it's been marked and admitted, no, you can use it and then we'll return it with the cluster of exhibits up here on the bench.

THE WITNESS: Set it up on your desk there

THE COURT Right

THE WITNESS Okay.

THE COURT After you're through with it though.

THE WITNESS: Okay The original property was purchased from Forrest Cummings and Eva Cummings by Charles

**Trial Transcript page 448 William Yee testifying**:

and Wanda Raley in, I believe, November 6 of 1974. And that's on the first page of 2-X.

THE COURT:Now Is that the bigger of the two pieces of property?

THE WITNESS: That's the larger piece, yes, sir.

THE COURT: Okay.

THE WITNESS: And the description is on Liber 443, page 222 and 223. On Liber 470, page 186 and 187, which is pages three and four of the exhibit 2-X, it shows that the property was then transferred to Lois Louise Clifford, also known as Louise Michael, Dr. Louise Michael. And this was done on March the 27~ of 1978. And then Liber 481, pages 311 and 312, which are the next two pages in the exhibit, show a transfer of property from Forrest Cummings and Eva Cummings to Lois Louise Clifford, also known as Michael, Dr. Michael, and this was on January the 12t~~ of 1979, and this was that second parcel.

THE COURT: And that's the square one just below the big one?

THE WITNESS: It's the small piece just below it, yes.

THE COURT: Okay.

THE WITNESS: And you're referring to exhibit--

**Trial Transcript page 449 William Yee testifying**:

THE COURT: 2-S.

THE WITNESS: 2—X. Excuse me--that's 2-S, as in Sam, is a--is a survey and 2-X, as in x-ray, is the chain of title. On pages Liber 625, page 43 and 44 and 45, it's a three page deed dated the 10th day of November, 1986, and this is a transfer of that property to William R. Yee and

Christine M. Yee, his wife at that time, and this is from Dr. Louise Michael, also known as Lois Louise Clifford. And this is where I acquired my interest in the property. And that interest continued on Liber 798, page 123, 124, and 125, where my interest continued and will continue as long as this property is under litigation. And that's why I have an interest and am in this Court at this time.

When you examine these deeds, it states that, on the first page--I'm sorry, on the second page, on a meander line a distance of 201.31 feet only and the westerly edge of the parcel being fifteen foot easterly of and parallel to the centerline of a private eighteen foot gravel road, together with rights of ingress and egress on said private road from the southwest corner of the parcel.. Now. that's important because my property can only be reached over private property and on a private road, and I have acquired a right to go over somebody else's property, which is also private, as well as mine.

**Trial Transcript page 450 William Yee testifying**:

And the first two lines of 440--Liber 443, page 222, it says to an iron stake, said meander line being for descriptive purposes only and the easterly edge of the parcel being the westerly edge of water of a private lake as intercepted between, and then it goes on. But, basically, what it says is I own the property to the water edge--water's edge, and that gives me riparian rights to the lake. And all of these deeds pretty much say the same thing, to the water's edge. And, so--and there's no reservation in any of these deeds that gives Forrest or Eva Cummings the right to raise the lake or in any way flood any part of the property that was purchased through this chain of title.

Now, I also obtained certified copies of surveys of these two parcels that compose 5281 Lake Drive. The first one has previously been marked as 2-V. The second one is 2-W, and they are Liber 2 of surveys, page 104, and label 3—

Liber 3 of surveys, page 106, and these were from the Register of Deeds office in Shiawassee found in Corunna, Michigan.

These are both certified copies, and I would like them to be admitted into evidence at this time.

THE COURT: Let me make sure that –

THE WITNESS: What's interesting about these surveys that I want the Court to be aware of is that although these are boundary surveys, they take the trouble

**Trial Transcript page 399 Mr. Vanraemdonck**

THE COURT You may go right ahead, Dr. Yee

MR.YEE I have here Liber 2 of surveys, page 104, that I would like marked, and I will ask the witness to examine it while it's being marked.

(At 10:36 a.m. exhibit 2-V marked)

MR. YEE Here's a copy, if you want

MR. DAVISON Oh, no, I'li share

CROSS -EXAMINATION

BY MR. YEE:

Q Do you recognize this?

A Yes

Q An what -- Can you tell the -- tell the court what this is?

A It's a certificate of land surveying

Q And what's the property?

A I believe the property is yours on Lake Bambi

Q Maybe if we looked at an aerial photograph. I'm referring to 3-G the aerial photograph of Bamb Lake. Could the witness point out the property for the Court, please?

A May I orient it properly so north is up?

Q We've been examining it with this at the top left through the entire proceedings, so.

THE COURT It would be easier for me if you did put north at the top.

MR. YEE: Okay. Go ahead, put the north up if the Court would find it convenient.

**Trial Transcript page 400 Mr. Vanraemdonck**

THE COURT: I usually like north at the top of diagrams.

MR. YEE Okay.

THE WITNESS This is the property in question right there.

MR. YEE: Would--for the record, he pointed out 5281 Lake Drive, which Is my property. Thank you. Have a seat please.

THE WITNESS: Thank you.

MR. YEE: I would like you to examine Liber 3, page 106, and while it's being marked by the Court, please study it.

(At 10:39 p.m., exhibit 2-W marked)

BY MR. YEE:

Q Could you tell the Court what this document is?

A It's a certificate of survey.

Q And what property is that referring to?

A It's a property that's south of the property in the first survey.

Q Okay. If I told you that 5281 Lake Drive was purchased in two parcels, the first parcel being shown on Liber 2, page 104, and the second parcel being the top portion of Liber 3, page 106, would---would--woul.d you be--would you understand that as to be the same as what is on 1-D?

A That's correct.

**Trial Transcript page 451William R. Yee testifying**

to state to the water's edge, making these surveys of riparian properties. So these two surveys support the chain of title in terms of their language.

THE COURT: --okay. And we're talking about two--

THE WITNESS: 2-$V_1$ as in Victor, and 2-W, as in water.

THE COURT: Okay. Let me let opposing counsel take a look at them and let me know if they have any objection.
MR. DAVISON: I have only one objection, Your Honor, with regard to 2-B and that's only a partial objection. That portion which is, in fact, a survey which has been recorded I have no objection to, but you will note that there is hearsay contained within the document. For instances, high water line per owner 5/5/97 on exhibit 2-H.
MR. ASELTYNE: I think--are you referring to B or to C?
MR.DAVISON: Did you say V as in Victor?
THE WITNESS:Yes.
MR. DAVISON: I beg your pardon.
MR. ASELTYNE: Neither do I, Your Honor.
THE COURT: They're admitted, Dr. Yee.
MR. DAVISON: I simply can't hear this morning, perhaps.
(At 9:35 p.m., exhibit 2-V 2-W received into

**Trial Transcript page 407**

THE COURT: Okay. And it's your claim, Dr. Yee, that proposed exhibit 1-D is not a survey of your property?
MR. YEE: 1-D?
THE COURT: Right. I'm trying to find out why we're spending all this time with Libers and pages and asking this man to read this stuff?
MR. YEE: I just--
THE COURT: Do you claim there's a mistake?
MR. YEE: --I just want to anchor it into the record that the surveys on Liber 2, page 104, and Liber 3, page 106, are surveys of my property.
THE COURT: I think we all agree with that.
MR. YEE: So if--if we don't have to go any further with it if they'll concede that point for the record.
THE COURT:I think that's why they offer the exhibit.
MR. DAVISON: That's why I offered it, and it's

**Trial Transcript page 408**

not proposed 1-D any more, Judge, you had entered it and it is admitted 1-D.

THE COURT: Okay. And that's agreeable with you?

MR. ASELTYNE: It is, Your Honor.

THE COURT: Stipulated, and we can go right on to a new area.

BY MR. YEE:

Q Okay. If you--if you--now the other issue I want you to review this record for and the question I'm asking you is, anywhere in any of these deeds, this chain of title, is there a reservation on any of the sellers to raise or lower the lake level or to establish more than one lake level, for example, a winter and a summer lake level

MR. DAVISON: We will concede there is not.

THE COURT: And he's already said there isn't a reservation here and he has never seen one, and when you asked whether he had heard of one, it was an objection I sustained. So, no. The answer to that is no. Next question.

**Trial Transcript page 510**

THE COURT: So since 2001 you've been living-

MR. YEE: I've been living there every day.

THE COURT:- -okay.

MR. YEE: And at the time I was there from '86 to '91, the lake was unstable around 799. It would go a little bit above it, a little bit below it, but it revolved around 799. And starting In '94, It started revolving around 801, approximately, give or take six inches, except f or those few times when it went very low, and about that time I was particularly interested In the appearance and I took trouble to take photographs when It went low, but it wasn't low very often.

THE COURT: So what happened to make It do that? MR. YEE: Well, the stop logs were chained in '94, and no one

was--except for that period in '98, no one was opening the four inch valve or the twelve inch valve, and no one was removing stop logs. The most they did In '95, for some reason, they removed the top stop log and then in April of '96 they got an order from Judge Fullerton that they could replace it, so then It went. back up and it stayed up until '98 when for some reason from August until November, they opened up the four inch drain and let it drain continuously for that period of time and it went low, and that's when I took those pictures in '98.

(2)

Supreme Court, U.S.
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Docket No: 03-352

IN THE SUPREME COURT OF THE UNITED STATES

William R. Yee,

Petitioner,

v

Shiawassee County Board of Commissioners et al,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE MICHIGAN SUPREME COURT

# RESPONDENTS, BRYAN AND KELLY JACKSON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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_____/

12 11

## QUESTIONS PRESENTED FOR REVIEW

1. Have the Courts of the State of Michigan changed the law so as to deprive Dr. Yee of his property in violation of the 5th and 14th Amendments of the United States Constitution.
   Petitioner says yes.
   Respondents Bryan and Kelly Jackson say no.

2. Has Dr. Yee enjoyed the benefit of due process in connection with this matter?
   Petitioner says no.
   Respondents Bryan and Kelly Jackson say yes.

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## STATEMENT REGARDING JURISDICTION

Respondents Bryan and Kelly Jackson do not contest Petitioner's citation to the 5th and 14th Amendments from time to time during proceedings below, however, Respondents dispute that those constitutional provisions and the arguments regarding the Michigan courts changing the law to deny Dr. Yee his rights as a violation of those amendments have ever been raised.

## STATEMENT OF THE CASE

Respondents Bryan and Kelly Jackson do not articulate any dissatisfaction with Petitioner's reliance upon the Michigan Court of Appeals' statement of facts as the required "Brief Statement of the Case," as far as it goes. However, Bryan and Kelly Jackson can not comment through this Response as to the balance of Petitioner's "Statement" aside from the Michigan Supreme Court's denial of Leave to Appeal. Respondents Bryan and Kelly Jackson may well have been interested individuals in the separate action to set the lake level commenced by the Shiawassee County Board of Commissioners discussed by Petitioner. However, they were not directly represented by this office in that action, and, as discussed below, were not distinct litigants.

## ARGUMENT

### I. THERE HAVE BEEN NO CHANGES IN MICHIGAN LAW THAT AFFECT PETITIONER'S PROPERTY RIGHTS

The thrust of Petitioner's complaints revolve around his frustrated effort to initiate an action to set the lake level on the strength of his independent petition. As was found by the Michigan Court of Appeals, Michigan law does not afford private individuals a cause of action to initiate such a proceeding. Indeed, Michigan Statutory Law, pursuant to the Inland Lake Level Act ("ILLA") MCL 324.30701 et seq; MSA 13A.30701 et seq, sets forth specific procedures for the setting of such lake levels.

Those procedures require the County Commission to charge the County Prosecutor to initiate the action. Private individuals have the right to petition such conduct and indeed, should sufficient numbers so petition, compel the commencement of such an action. MCL 324.30702(i); MSA 13A.30702(i), and MCL 324.30704(i); MSA 13A.30704(i)

Petitioner does not dispute the Michigan Court of Appeals' analysis reflecting modifications of the pertinent lake level statutes over time. In particular, Petitioner does not dispute the Court's conclusion that the modifications lacked any substantive change as they would apply to this matter. Petitioner instead points to the case of Arnold v Ellis, 5 Mich App 101; 145 NW2d, 822 (1966) to support the proposition that a private cause of action may be brought by an individual such as himself under the ILLA and accordingly, the Genesee County Circuit Court committed error in dismissing his complaint for lack of jurisdiction.

The Michigan Court of Appeals' affirmation of the Circuit Court dismissal acknowledged the Arnold v Ellis case, noting that Arnold did not foreclose the possibility of a private cause of

action. The Yee Court of Appeals did foreclose a private cause of action for the reasons set forth therein speaking to public policy, public interests, and the overall purpose and function of the statute. The Yee panel further found the Arnold panel's decision lacking and unpersuasive, as it did not incorporate that type of comprehensive overview and analysis at the time it elected to not foreclose a private cause of action. This is an alleged change of law according to Dr. Yee.

The thrust of Dr. Yee's argument within the Petition relies on the administrative order of the Michigan Supreme Court of November 1990 for purported teeth. That Order gave rise to a new court rule governing the binding nature of opinions published by Michigan's Court of Appeals. See MCR 7.215 (I)(1) which provides:

> "A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special Court of Appeals as provided in this rule. "

The Yee Court of Appeals decision made reference to this Court Rule in the context of its analysis addressing the Arnold argument. Petitioner's argument along these lines is premised upon the notion that this 1990 Court Rule relieved subsequent Court of Appeals panels from having to follow the precedent set by decisions prior to November 1, 1990. However, such has never been the case.

This portion of MCR 7.215 in fact, changed the extent of stare decisis in Michigan. Prior to its implementation, published

decisions by the Court of Appeals were binding only upon the trial courts and **not subsequent panels of the Court of Appeals.** Thus, had MCR 7.215 (I)(1) not been implemented by the Michigan Supreme Court, the Arnold v Ellis case would not be in any way, shape, or form, binding upon the Yee Court of Appeals panel anyway.

Petitioner's argument is premised upon the assumption that prior to the implementation of MCR 7.215(I)(1) the Arnold v Ellis decision would have been binding in subsequent panels of the Court of Appeals. As such was not the case, and that was not changed by virtue of the codification of MCR 7.215, Petitioner's arguments along these lines are wholly without merit.

## II. PETITIONER'S CLAIMS OF DENIAL OF DUE PROCESS ARE MOOT AS HE HAS BEEN AFFORDED A FULL OPPORTUNITY TO BE HEARD

To the extent Petitioner's complaints are that he has been deprived of property without due process, i.e. an opportunity to be heard, he has not set forth an actual case or controversy to this Court, as such are contemplated under Article III of the Constitution. See Hans v Louisiana, 10 S.Ct. 504; 134 U.S. 9; 33 L.Ed. 849 (1890).

The 5th and 14th Amendments taken together are generally deemed to protect private citizens from encroachments or deprivations based on state conduct. It does not apply to private citizens such as Respondents Bryan and Kelly Jackson. In any event, as set forth in the actual Petition to this Court, the argument seems to be that the State of Michigan changed its law to deprive him of property without due process. It is well-settled law that in order to make a prima facie claim of denial of due process, Plaintiff must establish two (2) critical elements:

1. A plaintiff's liberty or property interests have been invaded by government without an opportunity to challenge the invasion;

2. The justification for the invasion is at least plausibly disputable.

See for example Rainbow Valley Citris Corporation v Federal Crop Insurance Corporation, 506 F.2d, 467 (C.A. AZ, 1974).

Petitioner has failed to establish these elements at any point in the proceedings.

The notion that his property interests have been invaded by the government is premised upon the faulty conclusion that the law was changed simply to deprive him of his rights. That argument has been addressed above and is fatal to the due process claim.

Additionally, he has had opportunity to challenge the so-called "invasion" by arguing at every level that the Arnold v Ellis case controls. Indeed, the very Petition advanced to this Court contains citations to and quotes from the proceedings wherein Petitioner was allowed to advance arguments regarding the setting of the lake level.

Outside of dissatisfaction with the outcome of that hearing, combined with dissatisfaction with the appellate review process in the Michigan courts, Petitioner has not set forth any unusual aspect to the proceedings which serve to deprive him of due process. Accordingly, it is submitted that Petitioner has had the benefit of due process.

The source of his dissatisfaction from a procedural standpoint is merely that the hearing was commenced by the

actions of the County Prosecutor at the direction of the County Board of Commissioners as opposed to a complaint initiated by himself. As he was given a full opportunity to present proofs in the County action, this is a procedural distinction without any significance and did not result in any deprivation of due process. It has simply been advanced as a vehicle for Petitioner to bring this matter to this Court's attention.

## III. PETITIONER'S NON-COMPLIANCE WITH RULE 10

Respondents Bryan and Kelly Jackson assert to this Court that Petitioner has presented no compelling reason for the writ of Certiorari to be granted. As set forth above, the argument that the courts in the State of Michigan have somehow modified the law to deprive him of his property are not only inconsistent with the evolution of Michigan law, but were never raised below and thus not preserved for appeal. Secondly, the complaint that Dr. Yee has been deprived property without due process under the 5th and 14th Amendments are simply not supported by the record or the law.

## CONCLUSION AND RELIEF REQUESTED

Respondents Bryan and Kelly Jackson request that Petitioner's efforts to seek a Writ of Certiorari from this Court be denied.

Respectfully submitted,

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(3)

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**U.S. Supreme Court No. 03-352**

**IN THE UNITED STATES SUPREME COURT**

On Petition for Writ of Certiorari from the Michigan Supreme Court

WILLIAM YEE, Petitioner, vs. SHIAWASSEE COUNTY BOARD OF COMMISSIONERS, Respondent,

**and**

WILLIAM R. YEE, Petitioner, vs. GEORGE BRAIDWOOD, II (JR.), et al, Respondents

**and**

WILLIAM YEE, Petitioner, vs. DONALD G CUMMINGS, et al, Respondents

**and**

IN THE MATTER OF:
Determination of a Lake Level
for the Waters of Bambi Lake,
Bennington Township,
SHIAWASSEE County, Michigan,
WILLIAM YEE, Petitioner, and SHIAWASSEE COUNTY BOARD OF COMMISSIONERS, et al, Respondents,

# RESPONDENTS CUMMINGS, FAYLING & CALL, ETAL RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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16 pp

## STATEMENT OF QUESTIONS PRESENTED

I. **HAS APPLICATION OF MICHIGAN'S INLAND LAKE LEVELS ACT WORKED AN UNCONSTITUTIONAL TAKING AGAINST PETITIONER YEE?**

| | |
|---|---|
| **Petitioner states** | **Yes** |
| **Respondents state** | **No** |
| **Trial Court stated** | **No** |
| **Michigan Court of Appeals stated** | **No** |

II. **DID THE YEE COURT OF APPEALS ERR IN REFUSING TO FOLLOW ARNOLD V ELLIS, 5 MICH APP 101 (1966)?**

| | |
|---|---|
| **Petitioner states** | **Yes** |
| **Respondents state** | **No** |

III. **DID THE YEE TRIAL COURT ABUSE ITS DISCRETION IN SANCTIONING PETITIONER FOR THE FILING OF SUBSEQUENT ACTIONS INVOLVING THE SAME ISSUES AND PARTIES AS YEE?**

| | |
|---|---|
| **Petitioner states** | **Yes** |
| **Respondents state** | **No** |
| **Trial Court stated** | **No** |
| **Michigan Court of Appeals stated** | **No** |

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## STATEMENT OF FACTS AND PROCEEDINGS

In the late 1960's, Forest Cummings and a partner owned a large parcel of land in southern Shiawassee County. In order to enhance its value for development purposes, it was decided to build a dam, thus creating Bambi (or Cummings) Lake. To this end, the property was surveyed and an application for dam permit prepared. Following issuance of the permit construction on the retaining dam and spillway commenced.

The surface level elevation of Bambi Lake can be controlled in two fashions:

1) Two discharge pipes and control valves which go through the dam, and

2) A spillway with removable stop logs.

As a practical matter, surface elevation was controlled by use of the spillway by adding or removing stop logs as necessary. Louis Homola, who assisted in the construction of the spillway and also maintained it for a number of years once Forrest Cummings became too enfeebled to do so has testified that the lake level was always maintained by keeping all stop logs in the spillway structure. Stop logs were removed only to accommodate additional water caused by winter or spring thaws and unusually heavy rains.

Appellant Yee's predecessor in interest, Dr. Michaels, was one of the first persons to build on the lake. Her home, located on the lowest lot abutting the lake, was built in approximately 1974. Dr. and Mrs. Yee purchased the home from the Michaels Trust in 1986. During the summer of 1993, the Yees began a series of improvements, including a new three-car garage with extensive attached driveway. Shortly thereafter, in July, 1994, they claim to have begun

experiencing the problems. Specifically, they noted cracks appearing in their basement floor with moisture "weeping" up through those cracks. They also claim that, beginning in late 1993, the Respondents/Appellees Cummings, et al, conspired to maintain a higher lake level by maintaining more stop logs in the control structure.

On June 14, 1996, Dr. and Mrs. Yee were divorced. Prior to that time, presumably so that he could maintain lawsuits in his own name, Mrs. Yee quit claimed her interest in the subject premises to Dr. Yee.

On January 1995 Dr. Yee filed the first of three lawsuits relating to Bambi Lake (hereinafter the "1995 action"). In the 1995 action, Dr. Yee sought two remedies:

1) Money damages for trespass/nuisance;

2) Enforcement as the "normal" lake level of the 799-foot crest elevation set forth in the dam permit.

Upon completion of discovery, the claim for money damages was submitted to mediation. All parties accepted mediation. Judgments pursuant to MCR 2.403 were entered by the Court. Each of the Defendants tendered payment of the respective judgment amounts to the clerk pursuant to MCR 2.620, and satisfactions thereof were entered.

Trial on the remaining issue of the "normal" lake level was scheduled to commence on January 19, 1999. In preparation therefore, trial briefs and trial motions were filed by Defendants as well as the Michigan DNR/DEQ. The court heard argument on these pretrial motions on the morning of trial. Following argument, the court dismissed the balance of the 1995 action finding:

1) It lacked subject matter jurisdiction to set a "normal" lake level, Plaintiff/Appellant's exclusive remedy being pursuit of the statutorily mandated process set forth in the Inland Lake Level Act, and

2) Even if the court had subject matter jurisdiction, and even if Plaintiff/Appellant was correct and the 1970 dam permit imposed upon Forrest Cummings an affirmative duty to maintain the lake level in accordance therewith, the recent death of Forrest Cummings left the court without personal jurisdiction over anybody against whom an enforcement order might issue.

In November 1999, Dr. Yee again filed a complaint against Defendants, and others (hereinafter the "1999 action"). In the 1999 action, Dr. Yee sought once again to have the court enforce the 799-foot surface elevation as set forth in the 1970 dam permit as the "normal" lake level. All parties moved for summary disposition pursuant to MCR 2.116(C)(7), claiming that the court's disposition of the 1995 case precluded the 1999 case under rules of *res judicata*. The court granted that motion as to all Defendants.

Following dismissal of the 1999 action, Defendants moved for imposition of actual costs and attorneys fees pursuant to MCLA 600.2591. The court ruled that the 1999 action was frivolous within the meaning of that statute, and imposed actual costs and attorneys' fees.

Appellant Yee made various attempts to appeal the orders of dismissal entered by the trial court in both the 1995 and 1999 actions. Ultimately, by order of the Court of Appeals, the various filings of Appellant were deemed to be applications for leave to appeal pursuant to MCR 7.203(B), and granted said applications. Following briefing and oral argument, the Court of Appeals released its opinion for pub-

lication on May 21, 2002 affirming the trial court. Yee v Shiawassee County Board of Commissioners, et al, 251 Mich App 379 (2002).

Dr. Yee's application for leave to appeal to the Michigan Supreme Court was denied 468 Mich 852 (2003) as was his motion for reconsideration and/or stay of proceedings. 468 Mich _____ (2003); 664 NW2d 212 (Table)(2003).

Following dismissal of the 1995 action, a petition was filed with the Shiawassee County Board of Commissioners pursuant to the so-called Inland Lake Level Act, MCL 324.30101. The matter was tried during the first week of June, 2002, with the court rendering its opinion on the record on June 12, 2002. In that opinion, the court deter-mined the normal lake level of Bambi Lake to be 800.67 feet, the level of the lake with all spillway stop logs in place. An order to this effect was entered by the Court on August 30, 2002. On July 2, 2002, Appellant Yee filed a claim of appeal with the Michigan Court of Appeals pursuant to MCR 7.204. On July 31, 2002, 29 days thereafter, Appellant Yee filed an application for a so-called "bypass" appeal to the Michigan Supreme Court pursuant to MCR 7.302. The application for "bypass" appeal was denied by the Michigan Supreme Court _____ Mich _____; 653 NW 2d 413 (Table)(2002)

## I. HAS APPLICATION OF MICHIGAN'S INLAND LAKE LEVELS ACT WORKED AN UNCONSTITUTIONAL TAKING AGAINST PETITIONER YEE?

| | |
|---|---|
| **Petitioner states** | **Yes** |
| **Respondents state** | **No** |
| **Trial Court stated** | **No** |
| **Michigan Court of Appeals stated** | **No** |

Distilled to its essence, Petitioner's claim is that he has been subjected to an unconstitutional taking of his property, without due process of law, by application of the Inland Lake Levels Act and the proceedings held under it. For numerous reasons, he has not.

A) First and foremost, Petitioner's claim that the ILLA, and its instant application, benefits only private individuals, and not the public generally is unfounded in fact and in law. As noted by the Michigan Court of Appeals in Yee, supra:

> "That Bambi Lake is a private lake similarly does not support plaintiff's claim that initiation of proceedings by a governmental agency under Part 307 [i.e., the ILLA] would amount to an unconstitutional taking of private property for a non-public purpose. As noted above, the statutory proceed-ings for establishment of a normal lake level were devised 'for the protection of the public health, safety and welfare,' as well as 'the conservation of the natural resources of this State.' Even assuming that a governmentally initiated proceeding to determine the normal level of Bambi Lake could constitute a taking of private property, regulation of the lake level directly protects not only those private lands fronting on the lake, but also those public resources and property interests located downstream from the spillway.

> Accordingly, we are not persuaded that governmentally initiated proceeds to determine the normal level of a private lake are constitutionally infirm." Id at 401.

Because of the public interest involved, actions under the ILLA are not constitutionally prohibited as takings.

B) Contrary to his assertions, Petitioner has no "interest" in the property which he claims has or will be taken.

Petitioner draws whatever rights he might have to 5281 Lake Drive, Owosso, Michigan as the grantee by deed. That deed describes the demised property in a metes and bounds description with the easternmost boundary being the meander line of Bambi Lake. As was succinctly pointed out by Judge Tahvonen in announcing his decision in the ILLA action:

> "Once we have that call to the iron stake, we have then another call going south and east for what will be the easterly boundary of Dr. Yee's larger parcel. And that larger parcel, it says, is bounded on the east by the lake. And the line that's shown on the survey is a meander line only used for purposes of broadly describing the general location, configuration, and direction of travel of that eastern boundary. . .

So the only riparian interest exists by virtue of Dr. Yee's easternmost boundary being a body of water. And the purpose of that riparian interest is broadly to make certain that an owner of riparian property, like Dr. Yee, has the benefit of the use of the water.

* * *

What they're talking about in terms of prolongations of the

north and south boundary is an extension of that north boundary line from the point of beginning however far you have to go to get to the water's edge. And then you follow the water's line down in a southeasterly direction to the intersection of the water's edge with the prolongation of the southern boundary. And that's why that easterly boundary will change, it will move. When the lake is low, that boundary will extend further and the distance from what the meander line described in the survey and the actual edge of the lake will expand as the lake drops, contract as the lake rises, and may, on some occasions, actually cross over the meander line. But there is no property interest in the meander line. The property interest is to the lake's edge, wherever that might be. Now sometimes that will intrude upon land within the meander line, there is no cause for objection there because what you bargained for was the edge of the lake as the easterly property boundary, and that's what you have." In Re Bambi Lake, Tr. pp 613-615

Because he has no property interest in the submerged land, there can be no taking as a matter of law. See, for instance, College Savings Bank v Florida Prepaid. . ., 527 US 666, 119 S Ct 2219, 144 L Ed 2d 605 (1999).

C) In any event, Judge Tahvonen found, historically, that Bambi Lake had been maintained at an elevation of 800.67 feet, i.e., with all stop logs in place, since the lake was built in 1970:

> ". . .it is unrefuted that that structure was designed and operated on the assumption that all the stop logs would be in and that that topmost top - topmost portion of the topmost log would establish the elevation of the lake.

> Now it seems to me, then, that the history shows that although the lake level has varied, the lake level has been established with all those stop logs in.
>
> * * *

The issue, you see, isn't what the lake level is on a particular day, the issue is what the configuration of level control structures permit as the lake level at any give[n] in time.

* * *

I am satisfied that it's true that the normal water surface elevation of Bambi or Cummings Lake has historically been maintained at the top of the weir structure, which we now know to be, with all stop logs in place, 800.67 feet." In Re Bambi Lake, Tr. pp 619-20, 622, 627-8

## Conclusion

Because the level of Bambi Lake has been maintained at 800.67 feet since its inception (i.e., 1970), there is no factual basis for Petitioner's claim of taking.

The ILLA has as its aim the broad goals of protection of the public health, safety and welfare as well as conservation of the natural resources of this State. Its application, therefore, does not work an unconstitutional taking. This is particularly so in the instant case where Petitioner has no property interest in the subject matter of the alleged "taking", and the manner in which this alleged taking is to take place, i.e., maintaining the level of Bambi Lake at 800.67 feet, is consistent with the historically maintained lake level.

**II. DID THE YEE COURT OF APPEALS ERR IN REFUSING TO FOLLOW ARNOLD V ELLIS, 5 MICH APP 101 (1966)?**

**Petitioner states** **Yes**
**Respondents state** **No**

Although it is somewhat difficult to ascertain Petitioner's next issue, it seems to be that the Michigan Court of Appeals somehow erred in its ruling by refusing to be bound by its decision of over 30 years earlier in Arnold v Ellis, 5 Mich App 101 (1966).

Initially, it should be noted that the Yee court distinguished its prior holding in Arnold:

> "In reaching this conclusion, we recognize that a panel of this Court previously considered the statutory change now found at MCL 324.30702 (1) and concluded that, by providing that the county 'may' - as opposed to 'shall' - seek to initiate proceedings to determine the normal level of an inland lake, the Legislature did not foreclose a private cause of action for this purpose. The panel in *Arnold,* however, failed to consider the comprehensive nature of the statutory scheme employed by the Legislature or the public purpose in devising that scheme, and we therefore reject its conclusion that suit by an individual is not foreclosed." Id at 399-400.

Distinguishing the instant case from one of its prior ruling certainly does not raise an issue of federal law!

Petitioner next indicates that it was inappropriate of the Yee court to decide that, notwithstanding the above-cited distinction, it would not follow the Arnold decision because the case was decided before the effective date of Administrative Order 1990-6. It appears that Petitioner is claiming

that the rule of *stare decisis* is ironclad, and that courts are forever bound by their prior holdings. This is neither the case in Michigan:

> ". . .this Court is mindful of the doctrine of *stare decisis*. *Stare decisis*, however, is not meant to be mechanically applied to prevent the Court from over ruling earlier erroneous decisions. (citation omitted) Rather, *stare decisis* is a 'principal of policy' not 'an inexorable command,' and the Court is not constrained to follow precedent when governing decisions are badly reasoned." Mack v City of Detroit, 467 Mich 186, fn 19 (2002)

nor in this Court:

> "The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. Payne v Tennessee, 501 US 808, 828, 111 S Ct 2597, 115 L Ed 2d 720 (1991) ("*stare decisis* is not an inexorable command; rather, it 'is a principal of policy and not a mechanical formula of adherence to the latest decision'") (quoting Helvering v Hallock, 309 US 106, 119, 60 S Ct 444, 84 L Ed 604 (1940))" Lawrence v Texas, 123 S Ct 2472, 2483, 156 L Ed 2d 508 (2003).

Whether distinguishing or overruling Arnold, the Yee court was justified in not following it.

In any event, the whole issue of the jurisdiction of the Yee court to determine the normal lake level was rendered moot by the filing of the petition which ultimately led to the trial of the lake level issue in In re Bambi Lake. See, for instance, Jefferson v City of Tarrant, Alabama, 522 US 75, 118 S Ct 481, 139 L Ed 2d 433 (1997).

## Conclusion

Although justified in not following Arnold, any error by the Yee court in refusing to do so was rendered moot by the filing of the petition to determine lake level and ultimate trial of that matter in In re Bambi Lake.

**III. DID THE YEE TRIAL COURT ABUSE ITS DISCRETION IN SANCTIONING PETITIONER FOR THE FILING OF SUBSEQUENT ACTIONS INVOLVING THE SAME ISSUES AND PARTIES AS YEE?**

| | |
|---|---|
| **Petitioner states** | **Yes** |
| **Respondents state** | **No** |
| **Trial Court stated** | **No** |
| **Michigan Court of Appeals stated** | **No** |

Petitioner next seems to indicate that the sanctions levied against him by the Yee trial court for filing the 1999 and 2000 actions constitute an unconstitutional taking. However, Petitioner makes no reference whatsoever to how this is so. Under such circumstances, this issue must be deemed abandoned on appeal. See, for instance, Buziashvili v Inman, 106 F 3d 709, 719 (CA 6, 1997):

> "Although defendants listed this as an issue, they make no argument in their brief in support of this contention. Therefore, we consider the argument waived."

In any event, the basis for the sanction was well discussed by the Michigan Court of Appeals in Yee. Id at 407-409, and Respondents incorporate that rationale herein.

## CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated herein, Respondents pray that the Court deny Petitioner's application for Writ of Certiorari.

Respectfully submitted,

GAULT DAVISON, P.C.

Dated:

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12500/12616/U.S. Supreme Court/Brief in Opposition to Writ of Certiorari/rla